

## MEMORANDUM

DATE: August 6, 2019

TO: Lucinda Luke, Port of Kennewick Counsel

FROM: Tara L. Parker

RE: Independent Investigation into Misconduct Allegations Against Port of Kennewick Commissioners Don Barnes and Thomas Moak

---

### I. SUMMARY OF THE INVESTIGATION PROCESS

This Report addresses allegations that were made on March 25, 2019 against Port of Kennewick (Port) Commissioners Don Barnes and Thomas Moak.<sup>1</sup> On April 12, 2019, I was hired to perform an independent investigation regarding the complaint. My report regarding the March 25, 2019 allegations was submitted to Port counsel on June 18, 2019. On June 26, 2019, Port counsel reported an additional issue for investigation. The latter issue was investigated and is addressed herein.

The complaint and witness statements raise four questions:

1. Did Commissioners Barnes and Moak violate the Washington Open Public Meetings Act, RCW 42.30, by privately discussing Port business?
2. Did Commissioner Barnes and/or Commissioner Moak violate Port rules and policies in their directives and communications?
3. Did Commissioner Barnes create a hostile work environment for the Port CEO in violation of Port policies and/or Washington law?
4. Did Commissioner Moak breach his obligation to perform his duties as Commission President to enforce the Commission's policies and procedures?

Over the course of the investigation, I interviewed the Complainant, the Respondents, and six witnesses, all of whom are Port employees. Numerous documents were reviewed in the course of this investigation, including the March 25, 2019 complaint; the applicable Port Commission Rules of Policy and Procedure; emails from witnesses related to the complaint; Port Commission meeting minutes and audio recordings; and other documents related to relevant Port matters.

This Report contains only facts that were relevant and necessary to the determination of the allegations. In accordance with the Port policy contained in Section 5.4 regarding investigations,

---

<sup>1</sup> A redacted copy of the complaint is attached as Exhibit 1.

the Respondents were presumed to have acted ethically and findings herein are based on a substantial evidence standard.<sup>2</sup>

Pursuant to Section 5.2 of the Port Commission's Rules of Policy and Procedure, the identities of the Complainant and the witnesses are kept confidential. The witnesses who were interviewed and the documents that were reviewed each conveyed an account of, and a perspective on, one or more of the events recounted below. On various points, some of these accounts were incomplete or conflicting. The following description of events represents a reconciliation of competing versions and, where necessary, the descriptions are informed by an assessment regarding witness's credibility in view of all the facts and circumstances on a more probable than not basis.

In weighing the credibility of the Complainant, Respondents and witnesses, I considered the factors provided in the Equal Employment Opportunity Commission's Guidance on Credibility: (1) the inherent plausibility of the witness's statements; (2) the witness's motive to give false statements; (3) whether the Respondent had a history of similar behavior to that which was alleged (4) whether the witness's testimony is corroborated by documents, or by others who saw or heard about the alleged incidents around the same time they occurred; and (5) the witness's demeanor during questioning. As the EEOC notes, "none of the above factors are determinative as to credibility." For the sake of brevity, the details of how each of these factors affected each credibility determination are not all included in this Report.

All of the information the witnesses provided regarding the allegations was considered in drafting this Report and was taken into account in the analysis and the conclusion even if it is not specifically referenced in this Report. This Report recounts some of the information obtained in the investigation to illustrate the process, analysis, and conclusions, but it does not contain all the information obtained due to its volume. This Report also combines and summarizes information as opposed to recounting it verbatim.

---

<sup>2</sup> Workplace misconduct investigations typically involve the "preponderance of evidence" standard, which means findings are based upon that which is supported by more than 50% of the evidence. *See, e.g.*, Washington Pattern Jury Instructions 21.01 Meaning of Burden of Proof—Preponderance of the Evidence, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 21.01 (6th ed.) However, the "substantial evidence" standard employed here is somewhat lower. As one court explained, "[s]ubstantial evidence is defined as 'more than a scintilla but less than preponderance,' and consists of 'such relevant evidence as a reasonable person would accept as adequate to support a conclusion.'" *Mareno v. Apfel*, 1999 U.S. Dist. LEXIS 8575 (S.D. Ala. Apr. 8, 1999). However, because the Policy instructs the investigator to presume the Respondents' conduct was proper, any finding to the contrary must also be sufficient to overcome that presumption.

## II. APPLICABLE STANDARDS

This investigation was undertaken pursuant to the Port Commission Rules of Policy and Procedure (Port Rules) adopted February 22, 2011.<sup>3</sup> In accordance with Port Rules Section 1.1, the Port “is a Washington port district, with authority to act under law, including but not limited to Titles 14 and 53 RCW. The powers of a port district are exercised through a port commission. The Port Commission of the Port of Kennewick consists of three Port Commissioners.”

Port Rules Section 1.2 specifies that the Port is subject to Washington State laws, including the Open Public Meetings Act (OPMA), chapter 42.30 RCW. The OPMA requires that all “meetings” of the Commissioners be open to the public and that all “actions” taken by Commissioners be done at meetings that are open to the public. Under the OPMA, “‘Meeting’ means meetings at which action is taken.”<sup>4</sup> And “action” is defined as,

[T]he transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. “Final action” means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.<sup>5</sup>

Because a governing body can transact business when a quorum (majority) of its members are present, it is conducting a meeting subject to the OPMA whenever a majority discusses a matter having to do with the agency’s business, whether in person, by telephone or e-mail.<sup>6</sup>

The Complainant alleges that the Respondents violated several Port Rules and Policies, which are specifically identified and addressed in the Allegations and Analyses section of this Report.

The Complainant and the Port CEO also alleged that the CEO was subjected to a hostile work environment and retaliation. In addition to Port Rules relevant to those claims, the Washington Law Against Discrimination (WLAD), RCW 49.60 applies.

Under RCW 49.60.180(3), it is an unfair practice for employers to “discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged

---

<sup>3</sup> The Commission Rules of Policy and Procedure are attached as Exhibit 2. During this investigation, the Commission adopted a resolution amending Section 5 regarding investigations. The revised language is attached as Exhibit 3.

<sup>4</sup> RCW 42.30.020(4).

<sup>5</sup> RCW 42.30.020(3).

<sup>6</sup> See MRSC “The Open Public Meetings Act,” at 6 (citations omitted), <http://mrsc.org/getmedia/275e74fc-9d43-4868-8987-a626ad2cea9f/open-public-meetings-act.pdf.aspx?ext=.pdf>.

veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability[.]”

The Equal Employment Opportunity Commission (EEOC) explains the elements necessary to establish a hostile work environment claim under both federal and Washington State law:

Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

The test for retaliation for protected activity under the WLAD is as follows:<sup>7</sup>

[The] employee must show that (1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's activity and the employer's adverse action.

### III. ALLEGATIONS AND ANALYSES

#### A. Alleged Violations of the Washington Open Public Meetings Act, RCW 42.30

The Complainant alleges that there were two occasions where the Respondents were in close agreement about subjects of Port business, such that it was likely that they had discussed those matters privately in violation of the OPMA. Those occasions are addressed separately below.

##### 1. The Ivy Land Sale Release of Option to Repurchase

At the January 22, 2019 Regular Commission Meeting, Port staff presented Resolution 2019-02, by which the Commission would authorize the release of a restriction on private property that the Port sold to Jerry Ivy in 2004. The purchase and sale agreement contained a “buyback clause” that provided that the Port could repurchase the property at an agreed appraised price if the purchaser did not develop the property within eighteen months of closing, i.e., by May 18, 2004.

---

<sup>7</sup> *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 120 P.3d 579, 589-590 (2005) (citations omitted).

Mr. Ivy did not develop the property and, over the following fifteen years, the Port did not seek to exercise its buyback rights.

At the January 22, 2019 meeting, the staff informed the Commission that Mr. Ivy requested that the Port release its right to repurchase the property so he could move forward with a pending sale. Staff informed the Commission that the value of the property is currently in excess of \$1,000,000. Staff also stated that there was no strategic basis for the Port to repurchase the Ivy property. The Commission was not given any information about the Ivy transaction purchaser on January 22.

The Ivy property is a parcel adjacent to Vista Field, which is a large development project that the Port has been working on since 2013. After engaging in extensive talks with community members and strategic municipal partners, the Commission decided to keep its planning “inside the fence,” which meant that the project’s geographical boundaries would consist only of property that the Port already owned.

Commissioner Novakovich stated that he was in favor of approving the Resolution to release the buyback clause to allow Mr. Ivy’s pending transaction to move forward.

Commissioner Barnes stated that he was disappointed in the amount of information provided by the staff on this matter. He further stated that he thought the property held strategic value for the Port given its proximity to the Vista Field project. He stated that the Port had an obligation to look into potential options to buy back the property, or to seek design considerations from the parties in exchange for releasing the title restriction. He concluded that he did not have enough information to approve the Resolution.

Commissioner Moak also stated that the Port had an interest in determining whether the pending Ivy transaction may have impacts on the Vista Field development and related design concerns. He concluded that he needed more information before he could decide whether it was in the Port’s interest to relinquish its rights without more consideration.

Port Counsel informed the Commission that Mr. Ivy could seek a court declaration that the Port’s buyback rights were no longer enforceable because they were not timely exercised. Counsel also stated that Mr. Ivy could seek damages against the Port if its actions interfered with the transaction; although any award of damages would be up to the court.

Ultimately, the Resolution was tabled, and the CEO agreed to provide the Commission with additional information.

a. Information from Complainant and Witnesses

The Complainant and several witnesses stated that the Respondents’ initial opposition to releasing the Ivy property buyback clause made no sense to them. They articulated five reasons why they thought it was not viable for the Port to repurchase the property and should therefore allow the Ivy transaction to proceed without delay: (1) The Vista Field Master Plan did not include or provide for purchasing additional property; (2) the Port budget did not have funds sufficient

to purchase the Ivy property; (3) the Port faced potential litigation if it refused to release the buyback clause; (4) there could be backlash from community members who support the proposed purchaser, the Yakima Valley Farm Workers Clinic; and (5) various jurisdictional partners would likely view such an expenditure to be contrary to prior Port plans and commitments.

From the perspectives of the Complainant and the staff member witnesses, the Resolution to release the buyback clause was a “no-brainer,” and they were very surprised by the Respondents’ objections to it. For those reasons, the Complainant and some witnesses speculated that the Respondents had discussed the matter privately in violation of the OPMA.<sup>8</sup>

b. Information from Commissioner Barnes

Commissioner Barnes denied having any communication with Commissioner Moak about the Ivy property prior to the January 22, 2019 Commission meeting.

Commissioner Barnes stated that he was surprised to see a proposal from staff that would release the Port’s interest in the Ivy property because it is, in his opinion, of strategic value to the Vista Field project. He was dissatisfied with the amount of information that staff presented about this matter at the January 22 Commission meeting. He did not think it was in the interest of the Port or the public to simply “rubber stamp” the buyback release without seeing whether the Port could identify some more advantageous option. One possibility he noted was that the Port may be able to negotiate some design-related agreements from the parties in exchange for the release.

Commissioner Barnes appeared to be most bothered by the fact that staff did not inform the Commission, when they were engaged in the initial Vista Field planning in 2013, that the Ivy property was potentially available for purchase and inclusion in the development plan. Furthermore, Commissioner Barnes expressed a lot of frustration toward the CEO for what he considered to be a “defiant” response to the Commissioners’ questions.<sup>9</sup>

Although Commissioner Barnes later conceded that the neither the Port budget nor the Vista Field Master Plan is amenable to purchasing the Ivy property, he was not prepared to release the Port’s rights on the basis of the information provided by staff on January 22.

c. Information from Commissioner Moak

Commissioner Moak denied having any communication with Commissioner Barnes about the Ivy property prior to the January 22, 2019 Commission meeting.

---

<sup>8</sup> The Complaint also suggests that the Respondents may have been motivated by racial animus. The Respondents vehemently denied any such motivations and took great offense to that claim. The information obtained in this investigation provided no support for the claim that the Respondents were motivated by racial animus.

<sup>9</sup> Audio recordings of the Commission meetings at issue were listened to as part of this investigation. Nothing in the recordings clearly conveyed vocal tones or language that was less than professional on the part of any party in this matter.

Commissioner Moak stated that, after hearing Commissioner Barnes' concerns in the January 22 meeting, he agreed that the Commission did not have enough information to determine whether the Resolution was in the Port's interest. He wanted more information to determine whether the Port might be able to leverage its position to obtain some agreement from the prospective purchaser that would ensure that the Port's design goals were met.

d. Analysis

The information obtained in this investigation suggesting that the Respondents may have communicated privately about Resolution 2019-02 prior to the January 22, 2019 Commission meeting in violation of the OPMA is not sufficient to overcome the presumption that they did not do so. The Respondents each denied having any such communications. Moreover, each Respondent provided cognizable explanations for their request for more information about the matter on January 22, 2019.

2. Proposal for Mediation Between Commissioner Barnes and the Port CEO

The Complainant alleges that on March 22, 2019, Commissioner Moak suggested to the Port CEO that he and Commissioner Barnes engage in a mediation to resolve their conflicts. According to the Complainant, "a very short time later [the CEO] received a phone call from Port legal counsel saying that Commissioner Barnes called her asking her to schedule mediation between himself and [the Port CEO]." The Complainant had no first-hand knowledge of these events. He states that the timing of these events demonstrates that the Respondents must have discussed such a mediation in violation of the OPMA.

a. Information from Port CEO

The Port CEO stated that, on or around March 22, 2019, he told Commissioner Moak that he felt harassed and aggrieved by several things Commissioner Barnes had done. In response, Commissioner Moak suggested that the two engage in some sort of mediation process to resolve their differences. The CEO rejected the proposal, stating that Commissioner Barnes was entirely at fault in these matters. The CEO stated that then, "maybe the same day, Port legal counsel called or emailed saying that Commissioner Barnes raised the idea of a mediation with her."

b. Information from the Respondents

Commissioners Moak and Barnes denied having any communications with each other regarding a mediation between the CEO and Commissioner Barnes. Each described thinking about the idea, independently, in response to the conflicts at that time.

c. Analysis

The Respondents are presumed to have behaved ethically. The timing in which the Respondents each raised the idea of a mediation is questionable. However, all parties with knowledge of these events were aware of significant conflicts that needed to be addressed and mediation is a common tool for addressing conflict in professional settings. Accordingly, it is plausible that the

Respondents were thinking about the situation in the same way within a short timeframe. Therefore, the information obtained in this investigation does not constitute substantial evidence of wrongdoing sufficient to overcome the presumption that the Respondents complied with the OPMA.

**B. Alleged Violations of Port Rules<sup>10</sup>**

The Complainant and several witnesses alleged that Commissioners Barnes and Moak violated Port Rules and Policies in their directives and communications to staff and third parties that are related to Port business.

The specific Port Rules at issue are as follows:<sup>11</sup>

**3. COMMISSION CODE OF CONDUCT**

**3.1 Purpose.** The purpose of these Port of Kennewick Rules is to foster public transparency and public accountability concerning the transaction of Port business and to protect, and promote the efficiency of, the Port by prohibiting incidents and areas of conflict. Commissioners shall conduct themselves in accordance with all laws and applicable policies[.]

**3.6 Conduct as Commissioner.** Commissioners shall adhere to these Rules of Policy and Procedure as adopted by the Commission, and shall conduct themselves with civility and respect at all times with one another, with staff, and with members of the public. [...]

**3.9 Shared Information and Advocacy.** Recognizing that differences may exist among the Commissioners and that a collegial approach to issue resolution is preferred, Commissioner shall make available to fellow Commissioners all information related to Port activities. A Commissioner should make clear the foundation upon which an opinion stands; be candid about any philosophical or political preferences; and, recognize and make clear the limits of expertise.

**3.12 Commission-Staff Relations.** Commissioners may not attempt to exercise individual authority over the Port or staff, except as explicitly set forth and authorized in Commission policies, including the Delegation Policy referenced in Section 1.3.

---

<sup>10</sup> The Complainant and the Port CEO claimed that Commissioner Moak violated Rule 3.6, which states that “Commissioners shall conduct themselves with civility and respect at all times,” when he allegedly “dressed down” a Public Works Director. They said they found the event “embarrassing” and harmful to the Port’s relationship with a municipal partner. This allegation was only considered in relation to other allegations of uncivil conduct due to witness assertions that pursuing the matter in this investigation would not serve the Port’s interests.

<sup>11</sup> The Complainant cites additional Port Rules that are substantively identical to those specifically included in this Report. Redundant and/or irrelevant portions of the Rules are therefore omitted. Although some sections of the Port Rules have been updated, the Rules that were referenced in the Complaint remain unchanged.



12.3 Commissioners individually may communicate directly with Port employees or contractors for the purpose of inquiry only. Commissioners shall, on business matters, deal with staff through the Executive Director. However, the Commission as a body and the Commissioners individually do not give direction to persons who report directly or indirectly to the Executive Director. If an individual Commissioner is dissatisfied with the response from the Executive Director or staff, the Commissioner may seek resolution through the Commission as a body.

13.2 Commissioner's Role. [See also, Section 2.] The Executive Director is authorized to make recommendations on policy matters to the Commission and the Commission retains the authority to accept, reject, or amend the recommendations. Individual Commissioners may not intervene in staff decision-making, scheduling of work, and executing department priorities. This is necessary to allow staff to execute priorities given by the Executive Director. All Commissioners with concerns affecting the Port of Kennewick should address those concerns with the full Commission or with the Executive Director.

13.3.2 The Executive Director is the administrator and manager of all Port activities and staff; and the information liaison between Commission and Port staff. Requests for information from Commissioners are to be directed to the Executive Director and will be responded to promptly. The information requested will be copied to all members of Commission so that each member may be equally informed. The Executive Director will provide staff support for Commissioners as appropriate in their official roles.

1. Directing Staff Work and/or Micro-Managing Staff

a. Information from Complainant and Witnesses

The Complainant and witnesses stated that Commissioners Barnes and Moak's directives to staff to continue gathering and reporting information related to the Ivy property, for approximately six weeks following the January 22, 2019 Commission meeting, was a waste of public resources and improperly interjected in staff roles. The witnesses also spoke at length about how the "Ivy episode" caused a severe deterioration in staff morale. Some staff reported that they now feel fearful for their jobs and are uncomfortable with one or both of the Respondents.

Witnesses specifically complained about Commissioner Barnes "micro-managing" the Port's real estate and finance staff by directly questioning their work and requesting specific answers from

them.<sup>12</sup> Those staff members stated that felt consistently undermined and disrespected by Commissioner Barnes.

b. Statements from Respondents

The Respondents stated that they thought it was in the Port's interest to (a) determine whether the Port had a viable option to derive some benefit from the Port's interest in the Ivy property before waiving any Port interest; and (b) determining whether there was some process-level error that led to the staff not alerting the Commission to the Port's interest in the Ivy property at a time when it may have been more advantageous. The Respondents stated that they believed they had duties to the Port and the public to get such information and they did not ever intend to convey a lack of respect for the staff members and their work.

Commissioner Barnes specifically denied "micro-managing" staff. He acknowledged that he sometimes took a strong interest in Port matters where he has some experience and expertise, and may have overstepped his bounds in speaking with staff directly. He acknowledged that in doing that he may have sometimes made staff feel disrespected, which he regrets.

c. Analysis

The witnesses provided consistent and credible statements related to their general feelings of frustration about the significant amount of time they spent gathering and reporting on the Ivy property matter. They unanimously attested that it was a waste of time and resources. Moreover, staff conveyed that they felt undermined, disrespected, and uncomfortable at work. The witnesses provided substantial evidence of significant organizational problems stemming from these matters.

Nonetheless, the information obtained in this investigation is not sufficient to overcome the presumption that the Respondents had good faith bases for their actions. As noted above, Port Rule 12.3 provides that Commissioners may communicate directly with Port employees or contractors for the limited purpose of inquiries. And the information obtained in this investigation does not show that the Respondents specifically directed staff to perform work related to the Ivy transaction that was outside the Commissioners' purview of authorized Commission actions. Accordingly, I do not find that the Respondents' conduct related to directing staff work constituted a violation of the Port Rules and Policies.

2. Commissioner Barnes' Phone Calls to Consultant DPZ and the Washington State Auditor's Office

a. Commissioner Barnes' call to DPZ

---

<sup>12</sup> The Complainant and CEO stated that Commissioner Barnes once instructed the Port Chief Financial Officer to alter numbers in a report. However, the CFO stated in his interview that Commissioner Barnes did not request any material alteration from him.

On February 18, 2019, a Port staff member received a call from two members of DPZ, the Vista Field planning consultant. The individuals from DPZ stated that Commissioner Barnes had called them to get their views related to the Ivy property matter. The consultants conveyed that they were troubled by the call because it is generally considered a breach of protocol for a Commissioner to directly contact a contractor. The Port staff member reported the call to the CEO. The CEO then called Commissioner Barnes to address the issue.

At the Commission meeting on February 19, 2019, Commissioner Barnes asked whether anyone had called DPZ. He then stated that he had done so and apologized for it. He did not share the substance of that conversation.

b. Information from Complainant and Witnesses

The CEO stated that he was very concerned about Commissioner Barnes' breach of protocol because it undermined him and could impair the Port's relationship with DPZ. The CEO and the Complainant pointed to provisions of the Port Rules, specifically in Section 13 regarding "Port Commission & Staff Roles and Responsibilities," arguing that individual Commissioners are prohibited from contacting consultants and other third parties for information related to Port business.

First, they cite Rule 13.2, which states, *"Commissioner requests for information shall be made to the Executive Director. Commissioners needing staff assistance shall work through the Executive Director"* They also cite Rule 13.3.2: *"The information requested will be copied to all members of [the] Commission so that each member may be equally informed."*

Witnesses stated that, prior to Commissioner Barnes' call to DPZ, Port Commissioners uniformly directed all inquiries regarding matters concerning Port business and operations with outside entities to the CEO, consistent with the rules above. The witnesses said these protocols were well understood and respected because compliance with them was necessary for the efficient and proper operation of the Port.

Witnesses noted that Port Commissioners did occasionally make inquiries to staff and third parties regarding trivial matters, such as a meeting times and locations. They said that was allowed for under Rule 12.3 which states, *"Commissioners individually may communicate directly with Port employees or contractors for the purpose of inquiry only. Commissioners shall, on business matters, deal with staff through the Executive Director."*

Witnesses and the Complainant contended that Commissioner Barnes' call to DPZ regarding the potential implications of exercising the buyback clause on the Ivy property was a "business matter," and therefore prohibited under Port Rules. They further stated that Commissioner Barnes' call to DPZ could damage the Port's relationship with the consultant. Finally, they stated that, by making that inquiry, Commissioner Barnes obtained information that was not uniformly and appropriately shared with the CEO and the full Commission.

c. Commissioner Barnes' Call to the State Auditor's Office

On June 24, 2019, Commissioner Barnes called Port counsel, Ms. Luke, and stated that he had called the Washington State Auditor's Office (SAO) regarding the Ivy buyback clause to inquire about accounting practices related to requirements for buyback clauses. Commissioner Barnes asked Ms. Luke whether the action violated any Port Rules, and whether he needed to disclose it at the next Commission meeting. Ms. Luke advised him that the action was likely prohibited and that he was required to disclose it at the next meeting, which was the following day.

At the June 25, 2019 Commission meeting, Commissioner Barnes read from a written statement, which was recorded in the official minutes as follows:

Commissioner Barnes disclosed that earlier this month, that he initiated an individual communication with the State Auditors for the purposes of inquiring about municipal accounting practices for real estate transactions with buy-back clauses.

Scott Hylton returned Commissioner Barnes's call last Friday, June 21, 2019, to say there are no accounting practices for tracking buy-back clauses. Commissioner Barnes stated this is simply an individual inquiry that he felt he could make under provision 12.3 of our Rules of Policy and Procedure. Commissioner Barnes's intention was to make the inquiry looking forward to the future, and the many real estate transactions anticipated at the Port, especially at Vista Field. Commissioner Barnes made the inquiry to try avoid the problems of the past and not make any new problems going forward.

Commissioner Moak did not make any statements related to Commissioner Barnes' disclosure.

After that meeting, Port staff reported serious concerns regarding Commissioner Barnes' call to the SAO. First, they said that it violated the protocols proscribed in the Port Rules above. Second, they said it could potentially raise a "red flag" causing the SAO to exert additional, undue scrutiny on the Port. Third, they said that they felt like Commissioner Barnes may have taken that action to raise such suspicion, thereby potentially causing Port staff to perform additional work in response to increased SAO scrutiny. And fourth, they felt that Commissioner Barnes' decision not to direct his inquiry to the CEO, who would then direct it to the Port's CFO, seriously undermined staff morale.

Additionally, witnesses stated that Commissioner Moak failed in his duties as Port Commission President by not stating that Commissioner Barnes violated Port Rules and asking him why he had done so.

d. Information from Commissioner Barnes

When he was first interviewed for this investigation, on May 29, 2019, Commissioner Barnes said that he apologized to the CEO for his call to DPZ. He conceded that he should not have called DPZ directly. In the Commission meeting on February 19<sup>th</sup>, he admitted his error and apologized for it. He stated in his interview for this investigation that he had been “overzealous” in his effort to explore whether the Port might benefit from buying back the Ivy property. He stated that, to the best of his recollection, the DPZ consultants gave him “neutral” feedback.

On July 17, 2019, Commissioner Barnes was asked about his call to the SAO. He stated that the facts were exactly as he provided them in the June 25, 2019 Commission meeting. He said he placed the call at least one week prior to June 21, 2019, but he was not certain of the date.

Commissioner Barnes said that his calls to the SAO and DPZ were proper under Rule 12.3 because he was merely making an “inquiry.”

c. Analysis

Commissioner Barnes initially conceded that he violated Port Rules when he called DPZ. That, and the totality of his actions, indicates that he did not make the calls with the belief that they were allowed under Rule 12.3.

Moreover, the plain language of Rule 12.3 can only be reasonably understood – in conjunction with the Port Commission and staff roles and responsibilities that are clearly laid out in Section 13 – to prohibit individual Commissioners from directing inquiries regarding Port business to third parties such as consultants and government agencies. A preponderance of the evidence gathered in this investigation supports the staff witness explanations regarding the important operational bases for such restrictions.

Accordingly, for all of the reasons above, the information obtained in this investigation substantially supports the conclusion that Commissioner Barnes violated Rule 12.3 when he called DPZ regarding a business matter; as well as Rule 3.1 and 3.9 by failing to be candid and transparent about the communication. The information obtained in this investigation also substantially supports the conclusion that Commissioner Barnes violated Rule 12.3 when he called the SAO regarding Port accounting practices, a business matter.

3. Commissioner Barnes’ Alleged Statements Regarding When He Learned the Ivy Property Purchaser’s Identity

On or about March 13, 2019, the Tri-City Herald reported that Commissioner Barnes said he did not know the identity of the Ivy property purchaser. The Commission was not informed of the buyer’s identity at the January 22, 2019 Commission meeting. However, the Commission was provided that information at least as early as February 6, 2019, when Port Counsel provided them with a memorandum on that topic.

a. Statements from Witnesses

Complainant and some witnesses alleged that Commissioner Barnes was untruthful to the Tri-City Herald. Witnesses also contend that Commissioner Barnes conveyed to the public in the March 12, 2019 Commission meeting that he was not previously aware of the buyer's identity. The witnesses contend that these alleged actions constitute violations of the Commissioner's obligations to be truthful and transparent and that it had the effect of undermining the standards of conduct throughout the Port workplace.

b. Statements from Commissioner Barnes

Commissioner Barnes stated that he did not speak to the Tri-City Herald for the aforementioned report. He acknowledged that he knew the Ivy property purchaser's identity at least as early as February 6, 2019, and claims that any impression he may have given otherwise was inadvertent.

c. Analysis

The information obtained in this investigation is insufficient to overcome the presumption that Commissioner Barnes did not knowingly or purposely mislead anyone regarding when he knew the identity of the Ivy property purchaser. It is plausible that the Tri-City Herald reported solely on the basis of what was stated in the March 12 Commission meeting. It is also plausible that Commissioner Barnes did not intentionally convey untruthful information to the public.

**C. Allegations that Respondents Harassed and/or Threatened the Port CEO**

The Complainant and the CEO allege that Commissioners Moak and Barnes subjected the CEO to harassment and a hostile work environment. Some of these allegations were also framed as "retaliation."<sup>13</sup> In the interest of brevity, his claims are summarized here.

1. Information Regarding Hostile Treatment from Commissioner Barnes

a. Information from Witnesses

On February 21, 2019 Commissioner Barnes called the CEO. The CEO claims that Commissioner Barnes accused him of fraud and intentionally withholding information regarding the Ivy property transaction from the Port. According to the CEO, Commissioner Barnes instructed him to tell the Commission that he knew about the buyback clause but "forgot" to tell them about it. He said this was conveyed as an instruction to "fall on his sword." The CEO said he refused, as that would be false. The CEO described Commissioner Barnes' tone and language as extremely threatening.

The CEO also claims that Commissioner Barnes has (1) suggested the Commission might stop indemnifying the CEO in a legal matter; (2) stopped meeting with him; (3) behaved in a generally hostile way since the Complaint was filed, including "ambushing" him in an executive session and

---

<sup>13</sup> The CEO claimed that the conduct complained of in this section also constitute a "reprimand" contrary to the provisions of his employment contract. The CEO's rights under his employment contract are not within the scope of this investigation and those claims are not considered in this report.

a public meeting with questions regarding the Ivy property after the Commission approved the resolution to release its buyback rights.

Multiple witnesses stated that, concerning the claims where they were not direct witnesses, the CEO conveyed the related events to them in highly consistent terms. Multiple witnesses said they also witnessed Commissioner Barnes exhibiting a hostile demeanor toward the CEO and that they perceived the CEO to be seriously negatively impacted by what they viewed as Commissioner Barnes' mistreatment.

b. Information from Commissioner Barnes

Commissioner Barnes denied all allegations of hostile treatment. He acknowledged that his "level of agitation went through the roof" in regard to the Ivy property matter. And he expressed deep, personal offense toward what he perceived as the CEO's "defiance." With respect to the February 21 phone call, Commissioner Barnes denied that he was threatening. He also denied instructing the CEO to make a false public statement. He said that he was only trying to give an example of what type of statement the CEO could make that would convey that he took responsibility for an error. Commissioner Barnes also claimed that the phone call got "really animated" on both sides and that the CEO used some aggressive language. Finally, with respect to his alleged hostile treatment following the filing of the Complaint, Commissioner Barnes said he was just trying to keep some distance and avoid tensions while the investigation was ongoing.

c. Analysis

First, the information obtained in this investigation does not support a finding that Commissioner Barnes subjected the CEO to hostile treatment on the basis of a protected status, as is required to make a prima facie claim under the WLAD, RCW 49.60.180.<sup>14</sup>

Nonetheless, when viewed in its totality, the information obtained in this investigation does support a finding that there is substantial evidence showing that Commissioner Barnes exhibited repeated, significant hostility – in public and private – against the CEO. Such conduct was contrary to Port Rules 3.6 and 3.12.

2. Information Regarding Hostile Treatment from Commissioner Moak

a. Information from Witnesses

The Port CEO alleges that Commissioner Moak yelled at him on February 19, 2019 in an executive session of the Port Commission meeting. Specifically, he claims that Commissioner Moak yelled, "I blame you" in reference to the Ivy property matter. The CEO described this as a very upsetting event that was disrespectful, uncivil and unwarranted.

---

<sup>14</sup> The CEO's claims of retaliation were not clearly based upon the CEO's involvement in this investigation, which could constitute a protected status if Commissioner Barnes had some knowledge or belief about the CEO's involvement. However, those questions were beyond the scope of this investigation.

The Port CEO also stated that Commissioner Moak has threatened to fire him in public meetings. He acknowledged that Commissioner Moak may have considered the statements jokes. However, the CEO said the events were deeply embarrassing, disrespectful, and made him feel his job may be at risk.

Other witnesses confirmed that the CEO told them about being yelled at in the executive session, and one witness stated that he saw it first-hand, consistent with the CEO's account. Several witnesses said they witnessed Commissioner Moak "joking" about firing the CEO.

b. Information from Commissioner Moak

Commissioner Moak denied ever yelling at the CEO. He acknowledged that he was agitated in that meeting and that he may, at times, come across in an aggressive way even though that is not his intention. He expressed significant regret for having unintentionally creating discomfort. He also denied saying anything about firing the CEO in a manner that could be taken seriously. He expressed great respect for the CEO and said that he agreed with him almost all of the time.

c. Analysis

The allegations against Commissioner Moak in this section relate to the Port Commission Code of Conduct, Rule 3.6, which states that Commissioners "shall conduct themselves with civility and respect at all times with one another, with staff, and with member's of the public[.] The CEO and a witness consistently and credibly described Commissioner Moak's conduct during the February 19, 2019 executive session to be uncivil and disrespectful. Accordingly, the information obtained in this investigation is sufficiently substantial to overcome the presumption that Commissioner Moak conducted himself properly during the February 19, 2019 executive session. However, the information obtained in this investigation does not constitute substantial evidence sufficient to overcome the presumption that Commissioner Moak conducted himself within the bounds of the Port Rules on the occasions he made comments about firing the CEO.

**D. Allegations that Commissioner Moak Breached his Obligation to Perform his Duties as Commission President to Enforce the Commission's Policies and Procedures**

The Complaint and witnesses alleged that Commissioner Moak failed to properly perform his duties as Commission President. The overarching Port Rule that is applicable is 8.1, which states that the, "President of the Commission shall [...] ensure that the Commission jointly and consistently adheres to its own rules and policies, and those imposed upon it by the laws of the State of Washington."

1. Information from Complainant and Witnesses

First, the Complainant and the CEO state that Commissioner Moak failed in his obligation to enforce the Port's standards of decorum and civility by stopping the alleged incidents of incivility by Commissioner Barnes. Second, they allege that Commissioner Moak failed in his duty to publicly note that Commissioner Barnes violated Port Rules when he called DPZ and the SAO. They also



allege that Commissioner Moak failed to maintain or follow parliamentary procedure when he allowed an improper executive session on March 12, 2019. And fourth, they allege that Commissioner Moak failed in his duties to properly address the CEO's complaints against Commissioner Barnes.

## 2. Information from Commissioner Moak

Commissioner Moak acknowledged that Commissioner Barnes got agitated in some Commission meetings regarding the Ivy Property. However, he explained that Commissioners and others do get agitated in meetings at times when highly contested matters are discussed. He described his approach, as Commission President, as trying to ensure that everybody gets a full opportunity to have their views expressed, while trying to maintain order as necessary.

With respect to the March 12, 2019 executive session, Commissioner Moak explained that the meeting was immediately shut down and they returned to a public meeting once it was clear that business Commissioner Barnes sought to discuss involved a matter that was not allowable in executive session. The meeting minutes and additional witness statements confirm his account.

With respect to his lack of public response to Commissioner Barnes' arguable violations of Port Rules, Commissioner Moak noted that Commissioner Novakovich was equally capable of saying something about such matters. Moreover, Commissioner Barnes stated that he had made mistakes, which is allowed, as the Port Rules do not impose a standard of perfection on any of the Commissioners.

Finally, Commissioner Moak explained in his interview for this investigation that he did not perceive the CEO to be making a formal complaint to him regarding Commissioner Barnes. He further discussed, with some exasperation, that the Port does not have a Human Resources department and nothing in the Port Rules gave him guidance regarding how to handle personnel matters.

## 3. Analysis

The information obtained in this investigation does not support a finding that Commissioner Moak breached his duties as Commission President. Commissioner Moak's accounts of, and explanations for his conduct related to these allegations were credible. Moreover, Commissioner Moak's accounts were supported by the relevant meeting minutes and Port Rules.

# IV. CONCLUSION

For the reasons set forth above, based on the information obtained in this investigation, substantial evidence supports the conclusions that (1) Commissioners Barnes and Moak did not violate the Washington Open Public Meetings Act, RCW 42.30, by privately discussing Port business; (2) Commissioners Barnes and Moak did not violate Port rules and policies in their directives to staff related to Resolution 2019-02; (3) Commissioner Barnes did violate Port Rules and Policies when he called DPZ and the SAO regarding business matters; (4) Commissioner

Barnes did create a hostile work environment for Port CEO in violation of Port policies; (5) Commissioner Moak violated the Port Rule requiring civil and respectful treatment of others on one occasion; and (6) Commissioner Moak did not breach his obligation to perform his duties as Commission President.

## **EXHIBIT 1**

**TO:** Mr. Tim Arntzen, CEO, Port of Kennewick, and Mrs. Lucinda Luke, Legal Counsel, for the Port of Kennewick

**FROM:**

**RE:** Formal Complaint against Commissioner Thomas Moak, Port Commission President and Commissioner Don Barnes, Port Commission Vice President  
For violation of several of the Rules of Policy and Procedure document adopted by the Port Commission on February 22, 2011 and various violations of RCW 42. In addition I find their behavior to be a cause of misappropriation of public funds and for undermining the mission, goals and vision of the Port of Kennewick

Hand Delivered 8:30AM, Monday, March 25, 2019

*I am filing this complaint under protection of Paragraph 5.2 of the Port of Kennewick Commission Rules of Policy and Procedure document. And further request my name be held in strict confidence only to be revealed by written permission granted by me.*

I have been very discouraged and upset by what I have observed happening at the Port of Kennewick over the past several years since Commissioner Moak was elected. Things that I have heard, seen, and watched, especially in the past few months, have made me very concerned about the Port of Kennewick's ability to develop Vista Field, Columbia Gardens, The Willows, The West Richland Race Track and so many other projects pledged to constituents and the entire Mid-Columbia region.

I have witnessed the Port of Kennewick (POK) under the skilled leadership of CEO Tim Arntzen and his assembly of a highly qualified, professional, motivated and loyal staff accomplishing great things for this region and promised more to come. The POK has developed a sterling reputation for the highest degree of integrity, open and transparent conduct of business, and an ability to develop and nurture mutually beneficial strategic partnerships through trusting relationships. This has allowed the establishment of many very successful quality of life and economically beneficial projects that are equal to or greater than those anyone else has done anywhere. AND this has been accomplished with very limited resources and without burdening with an increase in taxes. However, I now see Commissioners jeopardizing future successes by beginning to act as experts violating adopted rules of policy and procedure.

I now feel as though the Ports, integrity, and promises are coming into question and unmatched sterling reputation, being tarnished if not crushed. I believe the behavior and actions of Commissioner Moak as President and Commissioner Barnes will have negative effects on the relationships the POK has establish with other local jurisdictions who have invested heavily in POK projects with their own funds.

I now see a CEO worn down, tired, and rendered ineffective by being ridiculed in public meetings particularly by Commissioner Moak but also by Commissioner Barnes and being instructed to work on frivolous if not libelous matters rather than continuing to focus his efforts on the already planned good work of the POK as set forth in Commission approved documents. I see a once bright, energetic staff now fearful, discouraged, some ready to seek employment elsewhere in order to escape the continued abuse and criticism of Commissioners Moak and Barnes. I see the actions of Commissioner Moak and Barnes tearing apart a once effective, award winning, loyal team and frankly this breaks my heart.

the Staff members and the Commissioners could have been likened to a family with separate, well-defined levels of responsibilities and duties. The Commission would establish the vision based on input from the constituency and then delegate the implementation of that vision to the CEO to use the limited resources of staff and finances, without raising taxes to carry out the vision to not only completion for the benefit of the public but to a level that is unrepresented. I have seen Mr Arntzen and his staff continually lower the level rate assessed POK District constituents while increasing the equity of those same constituents well over 300%.

Why would Commissioners Moak and Barnes even think they knew better and begin to micro manage and criticize the work of Mr. Arntzen and his staff who have more than proven their worth and effectiveness? And why do they have to revert to ignoring and violating policies and procedures that the Commission itself approved? Why would Commissioner Barnes in a recent Commission meeting say he has been asking for the Policy and Procedures document even though it was one of the very first documents he received when sworn in as a Commissioner?

should Commissioners Moak and Barnes continue to block the sale of the Ivy property for I can only assume was a dislike for the Hispanic culture of the buyer. An obvious example of discrimination. Why would Commissioner Barnes say in a Tri-City Herald article on March 14, 2019 he didn't know the buyer of the Ivy property was the Yakima Farm Workers Clinic when revealed the buyer Why does Commissioner Barnes continue to lie and why does Commissioner Moak refuse to perform his responsibilities as President.

My complaint involves the actions of Commissioners Moak and Barnes tearing down the Port of Kennewick as described above and their violation of many of the Port Commission Rules of Policy and Procedures as well as RCW 42 as outlined below.

I believe Commissioners Moak and Barnes have violated at a minimum the following:

Paragraph 2.2.6 states "Full transparency to the public" Commissioner Barnes has lied on several occasions.

Paragraph 3.1 states: "Commissioners shall conduct themselves in accordance with all laws and applicable policies"....

Paragraph 3.6 states "Commissioners shall conduct themselves with civility and respect at all times with one another, with staff, and with members of the public." As written above their treatment of staff in public meetings is appalling and certainly not within the categories of respect and civility. Commissioner Moak very uncalled for criticized the City of Richland's Public Works Director in a public meeting. The Richland's Public Works Director later complained that Commissioner's Moak's brow beating was the worst he ever experienced in a public meeting.

Paragraph 3.9 "Commissioners shall make available to fellow Commissioners all information related to Port activities." – Commissioner Barnes, without following proper procedures, called Port Consultants DPZ and did not relate this to all Commissioners.

Paragraph 3.11.1 "Commissioners must conduct themselves at all times in a manner that leaves no grounds for belief, or even appearance that information they have gathered on the job has been used for personal gain or gain of any individual or special interest group, whether such gain is financial or otherwise." What will an investigation reveal as to the motives behind Commissioners Barnes and Moak's attempt to derail the sale of the Ivy property.

Paragraph 3.12 "Commissioners may not attempt to exercise individual authority over the Port or staff, except as explicitly set forth and authorized in Commission policies, including the Delegation Policy referenced in Section 1.3" Examples – Moak going to staff ordering web site overall etc. Barnes asking the CFO to change numbers in financial statements and records; calling the Executive Director and telling him to change his already made statements regarding a Commission issue being discussed and possibly many more violations of this policy will be uncovered in a thorough investigation.

Paragraph 3.13.3 and RCW 42 – "Any exchange of communication between any two Commissioners may constitute an official meeting of the Commission and be in violation of the Act." On several occasions it has been obvious that Commissioners Moak & Barnes have discussed Agenda items prior to the Commission meeting. However a prime example of a violation of this policy and RCW 42 occurred when Commissioner Moak told CEO Tim Arntzen he needed to enter into mediation with Commissioner Barnes to resolve their differences then a very short time later Mr. Arntzen received a phone call saying Commissioner Barnes called to schedule mediation between himself and Mr. Arntzen. This leaves no doubt the two of them have been discussing this as they have many other Port related issues.

Mr. Arntzen has done no wrong whereas Commissioner Moak and Barnes have berated Mr. Arntzen in public and have lied on several occasions.

Paragraph 6.2 "Presiding Officer Duties. The Presiding Officer shall: 6.2.1 Preserve order and decorum in the Commission Chambers; 6.2.2 Observe and enforce all rules adopted by the Commission;" - Commissioner Moak in his role as President/Presiding Officer has grossly violated these rules in depth on many occasions. And has proven his incompetence to fulfill the role of President of the Port of Kennewick Commission.

Paragraph 6.13 "Executive Session" At the March 12, 2019 Commission Meeting Commissioner Barnes asked for an Executive Session to be added to the Agenda. Commission President Moak agreed without following proper Parliamentary procedure which was later corrected. Commissioner Barnes was asked the purpose for the Executive Session which he did not reveal.

Paragraph 8.1 Referring to the President of the Commission "Ensure that the Commission jointly and consistently adheres to its own rules and policies, and those imposed upon it by the laws of the State of Washington". Commissioner Moak has been in direct violation of this policy many times in addition to what is written above.

Paragraph 8.7 Referring to the President of the Commission. "Have no authority to supervise or administratively direct the Executive Director or Port staff, apart from authority expressly granted by the Commission. Commissioner Moak on many occasions has been in violation of this policy in addition to what is written above.

Paragraph 12.2 and Paragraph 12.3 "In the case of Commissioners requesting information or assistance without Commission authorization...." ..... "Commissioners shall, on business matters, deal with staff through the Executive Director. However, the Commission as a body and the Commissioners individually do not give direction to persons who report directly or indirectly to the Executive Director." Commissioners Moak and Barnes have violated this policy on a regular and consistent basis.

Paragraph 13.2 "Individual Commissioners may not intervene in staff decision-making, scheduling of work, and executing department." Commissioners Moak and Barnes continue to violate this rule. And Commissioners Moak and Barnes violate further "No Commissioner shall direct the Executive Director to

initiate any action, prepare any report, or initiate any project or study without the authorization of a majority of the Commission."

Paragraph 13.3.2 "Requests for information from Commissioners are to be directed to the Executive Director..." Commissioners Moak and Barnes have violated this rule. Barnes called DPZ on his own and did not disclosed doing so and even asked in a Commission meeting if anyone spoke with DPZ even though he had already done so. Again a violation of the rules and out right lying.

Commissioners Moak and Barnes have further violated several of the Ten Commandments for staying out of trouble as a Port Commissioner a list prepared and distributed by the Washington Public Ports Association and made a part of the Port of Kennewick's Port Commission rules of Policy and Procedures document particularly Number 3 "Thou shall not require the Port staff to do more work than necessary to inform (please) you when they could be occupied in improving the business of the Port." And Number 7. "Thou shall not argue with, grill, or embarrass Port staffers in public."

Commissioners Moak and Barnes have:

- 1.) Seriously violate many of the Port Commission rules of policy and procedures and RCW 42
- 2.) Created a very hostile work environment that had not existed previously
- 3.) Place the Port of Kennewick in a position to be sued by not respecting legal counsel's opinion regarding the Ivy property
- 4.) Wasted taxpayer money by individually and collectively directing staff to work on projects not contained in any approved plan of work
- 5.) Constantly micro manage, asserting their knowledge is superior to that of professional staff

I respectfully request in regard to Port Commission Rules of Policy and Procedure:

- 1.) The Executive Director investigate the merits of this complaint per Paragraph 5.2
- 2.) The Executive Director delegate a formal and thorough investigation per Paragraph 5.4
- 3.) Upon determination of violations, sanctions be imposed on Commissioners Barnes and Moak
- 4.) Public notification of wrong doing be made public per Paragraph 5.9
- 5.) Commissioners Moak and Barnes be asked to resign their Commission seats and be declared ineligible to ever hold any elected seat

## EXHIBIT 2



**PORT OF KENNEWICK, WASHINGTON**

**PORT COMMISSION**

**RULES  
OF  
POLICY AND PROCEDURE**

**ADOPTED AT A REGULAR, OPEN  
MEETING OF THE PORT COMMISSION**

**FEBRUARY 22, 2011**

## TABLE OF CONTENTS

	<u>Page</u>
1. Introduction and Purpose .....	1
1.1 Port of Kennewick .....	1
1.2 Other Governing Law .....	1
1.3 Port Managing Official .....	1
1.4 Purpose.....	1
1.5 Reserved Rights .....	1
2. Commission and Commissioners.....	1
2.1 Purpose.....	1
2.2 Governance .....	1
2.3 Actions .....	2
2.4 Port Financial Goals.....	2
3. Commission Code of Conduct .....	2
3.1 Purpose.....	2
3.2 Conflict Avoidance .....	3
3.3 Policy Acknowledged .....	3
3.4 Disclosure .....	3
3.5 Campaign Finance .....	3
3.6 Conduct as Commissioner .....	3
3.7 Commissioner Knowledge of Policies.....	3
3.8 Representation of Positions.....	3
3.9 Shared Information and Advocacy .....	3
3.10 Representation of Port Position .....	4
3.11 Special Privileges Prohibited .....	4
3.12 Commission-Staff Relations .....	4
3.13 Open Meetings .....	4
3.14 Commission Disclosure of Economic Associations .....	5
4. Full Transparency in Port Actions .....	6
5. Reporting Misconduct.....	6
5.1 General .....	6
5.2 Complaint.....	7
5.3 Initial Determination.....	7
5.4 Investigation.....	7
5.5 Determination and Recommendation .....	7
5.6 Notification of Determination.....	7
5.7 Reconsideration.....	7
5.8 Sanctions .....	8
5.9 Public Notification .....	8
5.10 Other Remedies Reserved.....	8

	<u>Page</u>
6. Commission Meetings .....	8
6.1 Presiding Officer .....	8
6.2 Presiding Officer Duties .....	8
6.3 Regular Meeting.....	8
6.4 Special Commission Meetings.....	8
6.5 Quorum .....	9
6.6 Recording Proceedings .....	9
6.7 Call to Order .....	9
6.8 Participation by Telephone .....	9
6.9 Commissioner Attendance at Meetings .....	9
6.10 Commission Meeting Staffing .....	9
6.11 General Conduct of Business.....	9
6.12 Public Comment.....	10
6.13 Executive Sessions.....	10
6.14 Commission Discussion.....	11
6.15 Media Representation at Commission Meetings .....	11
7. Agenda Planning.....	11
7.1 Placing Item on the Agenda.....	11
7.2 Agenda Preparation.....	11
7.3 Agenda Materials.....	11
7.4 Adding an Item to a Published Agenda .....	11
7.5 Agenda Item Order .....	11
7.6 Consent Agenda.....	11
8. Role of the Commission President.....	12
9. Role of the Commission Vice-President.....	12
10. Role of the Commission Secretary .....	12
11. Commission Committees .....	13
11.1 General.....	13
11.2 Committee Roles and Responsibilities .....	13
12. Commission and Port Action.....	13
13. Port Commission & Staff Roles and Responsibilities .....	14
13.1 General Roles.....	14
13.2 Commissioner's Role.....	14
13.3 Executive Director's Role.....	14
13.4 Staff Role .....	15
13.5 Summary .....	15
14. Budget and Procurement Authority .....	15
14.1 General .....	15

	<u>Page</u>
14.2 Financial Policies .....	16
14.3 Budgetary Authority .....	16
14.4 Procurement Authority.....	16
15. Evaluating the Executive Director’s Performance.....	16
15.1 General.....	16
15.2 Process .....	16
16. Commission-Auditor Relationship .....	17
16.1 General.....	17
16.2 Hiring and Reporting .....	17
17. Commission-Port Attorney Relationship.....	17
17.1 Port Attorney Role .....	17
17.2 Port Attorney Responsibilities .....	17
18. Indemnification and Defense Policy .....	18
18.1 Policy Stated .....	18
18.2 Definitions.....	18
18.3 Legal Representation .....	18
18.4 Exclusions .....	19
18.5 Reserved Rights .....	20
18.6 Policy Secondary to Insurance.....	20
18.7 Determination of Exclusion .....	20
18.8 Representation and Payment of Claims – Conditions.....	20
18.9 Effect of Compliance With Conditions.....	21
18.10 Failure to Comply With Conditions.....	21
18.11 Reimbursement of Incurred Expenses .....	21
18.12 Conflict With Provisions of Insurance Policies .....	22
18.13 Pending Claims .....	22
18.14 Modification of Chapter.....	22
18.15 Bargaining Unit Contracts .....	22
18.16 Punitive Damages .....	22
18.17 Application to Recall Proceedings.....	23
19. General Complaint Resolution.....	23
19.1 Administrative Complaints Made Directly to Individual Commissioners .....	23
19.2 Administrative Complaints – “Best Practice.”.....	23
Attachment: Ten Commandments for Staying Out of Trouble as a Port Commissioner .....	24

## 1. INTRODUCTION AND PURPOSE

1.1 Port of Kennewick. The Port of Kennewick ("Port") is a Washington port district, with authority to act under law, including but not limited to Titles 14 and 53 RCW. The powers of a port district are exercised through a port commission. The Port Commission of the Port of Kennewick consists of three Port Commissioners.

1.2 Other Governing Law. In addition to enabling legislation, the Port is subject to Washington State laws, including the open Public Meetings Act, chapter 42.30 RCW; the Public Records Act, chapter 42.56 RCW; and, the Code of Ethics for Municipal Officers, chapter 42.23 RCW.

1.3 Port Managing Official. Consistent with its authority under RCW 53.12.270, the Port Commission has delegated to the office of Executive Director such administrative powers and duties as deemed proper for the efficient and proper management of the Port's operations. See "Delegation of Authority to Executive Director," Port Resolution 2009-06 (February 10, 2009 – the "Delegation Policy.")

1.4 Purpose. It is the purpose of these Rules of Policy and Procedures to provide a framework and guide for governance, management and operation of the Port.

1.5 Reserved Rights. The adoption and maintenance of these Rules of Policy and Procedure ("Rules") create no vested rights or entitlements. These Rules may be revised, suspended, amended or repealed by majority vote of the Port Commission when acting pursuant to and in compliance with law.

## 2. COMMISSION AND COMMISSIONERS

2.1 Purpose. The purpose of the Commission is to:

2.1.1 Identify and define the purpose, values and vision of the Port, along with the results the Port is to achieve, and to communicate those items in the form of policy;

2.1.2 Make certain decisions as are designated by law; and

2.1.3 Hire, evaluate, and terminate the Executive Director.

2.2 Governance. Commission governance addresses:

2.2.1 Strategic leadership more than administrative detail;

2.2.2 Encouragement of diversity in viewpoints;

2.2.3 Collaborative rather than individual decisions;

2.2.4 Future, rather than past or present, direction;

2.2.5 Proactive, rather than reactive, conduct; and

2.2.6 Full transparency to the public.

2.3 Actions. The Commission will:

2.3.1 Produce and maintain written policies that ensure a high quality of governance and clear roles in decision-making between Commission and staff;

2.3.2 Regularly monitor, and evaluate the Executive Director's performance;

2.3.3 Adopt, and annually review, the Port's Strategic Work Plan;

2.3.4 Adopt the Port's annual budget;

2.3.5 Adopt, regularly review, and modify as necessary the Delegation of Authority to the Executive Director;

2.3.6 Set the rates, rules and regulations for services provided by the Port;

2.3.7 Purchase or dispose of real estate or other property to the benefit of Port District taxpayers/citizens; and

2.3.8 Take such other actions as may be required by law.

2.4 Port Financial Goals.

As specified in Port Resolution 2010-41, as may from time to time be amended, the Port Commission reiterates the following budgetary goals and acknowledges the importance thereof:

2.4.1 The Port shall work toward funding all operating expenses from revenues from Port operations;

2.4.2 The Port shall fund projects with available resources, not with bonds or loan financing unless otherwise in the best interest of the Port and the communities' long term interest;

2.4.3 The Port shall pursue fewer projects while selecting projects with the greatest return to the Port and to taxpayers; and

2.4.4 The Port shall pursue projects with development partners who demonstrate support (e.g. matching funds, political/citizen/taxpayer support, leveraged investment, enthusiasm/goodwill).

3. COMMISSION CODE OF CONDUCT

3.1 Purpose. The purpose of these Port of Kennewick Rules is to foster public transparency and public accountability concerning the transaction of Port business and to protect, and promote the efficiency of, the Port by prohibiting incidents and areas of conflict. Commissioners shall conduct themselves in accordance with all laws and applicable policies and further shall comply with the following.

3.2 Conflict Avoidance. Commissioners are strictly prohibited by law from entering into or engaging in any activity identified in chapter 42.23 RCW as a conflict of interest with their official duties as a Port of Kennewick Commissioner and shall further avoid conduct that may present an appearance of a conflict of interest.

3.3 Policy Acknowledged. On an annual basis and in a public forum, each Commissioner shall acknowledge the obligation to disclose any conflicts of interest under chapter 42.23 RCW.

3.4 Disclosure. On a case by case basis, each Commissioner will disclose to the other Commissioners in a public forum, any remote conflicts of interest under chapter 42.23 RCW. Disclosure will be noted in the Port's official minutes which are public record. As required by RCW 42.23.040, a Commissioner with such remote interest will not participate in any discussion and/or debate concerning such interest, will not vote on the matter, and will do nothing to influence any other Commissioner concerning their decision on the matter. The foregoing shall also apply to any business owned by a Commissioner's spouse, in the absence of a separate property agreement.

3.5 Campaign Finance. On or before April 15 of each year, or within (14) days of taking oath of office, each Port Commissioner shall file with the Port a copy of a Statement of Financial Affairs prepared in satisfaction of the requirements of RCW 42.17.240 - .241, which shall be available for public inspection at the first regular Commission meeting after the above-referenced dates.

3.6 Conduct as Commissioner. Commissioners shall adhere to these Rules of Policy and Procedure as adopted by the Commission, and shall conduct themselves with civility and respect at all times with one another, with staff, and with members of the public. As fiduciaries of the Port, Commissioners shall make decisions on the basis of public policy and shall demonstrate undivided loyalty to the interests of Port and its taxpayers. This loyalty shall supersede any conflicting loyalty to advocacy or special interest groups.

3.7 Commissioner Knowledge of Policies. Commissioners will become familiar with their individual and joint obligations pertaining to the Port's directive on reporting alleged improper governmental action, including actions required of the Commission regarding complaints by Port employees and/or the public of alleged improper governmental actions and/or employee claims of retaliation for reporting alleged improper governmental actions.

3.8 Representation of Positions. Unless authorized by the Commission at an open meeting or as set forth in Port policy or plan (e.g., an approved plan), an individual Commissioner may not represent a position as being the position of the Port, either in private communications or in a public forum.

3.9 Shared Information and Advocacy. Recognizing that differences may exist among the Commissioners and that a collegial approach to issue resolution is preferred, Commissioner shall make available to fellow Commissioners all information related to Port activities. A Commissioner should make clear the foundation upon which an opinion stands; be

candid about any philosophical or political preferences; and, recognize and make clear the limits of expertise.

3.10 Representation of Port Position. No Commissioner is authorized, without Commission authorization, to represent the Port with special interest groups, Port tenants, suppliers, vendors, consultants, contractors or others that are or seek to do business with the Port. Unless otherwise authorized by the Commission, a Commissioner shall disclose that the Commissioner's position is not that of the Port or of the Commission when participating in discussions, debates, and forums where the sponsoring group(s) or other participants are identified with a particular perspective on an issue and the Commissioner's participation might put into question both the Commissioner's and the Commission's impartiality. Nothing in this Policy prevents an individual Commissioner from stating a position as that of the individual Commissioner, but not that of the Port or of the Commission.

3.11 Special Privileges Prohibited. RCW 42.23.070 prohibits, in part, Commissioners from using public office to secure special privileges or exemptions for a Commissioner or others.

3.11.1 Commissioners must conduct themselves at all times in a manner that leaves no grounds for belief, or even the appearance that information they have gathered on the job has been used for personal gain or for gain of any individual or special interest group, whether such gain is financial or otherwise.

3.11.2 Commissioners shall avoid any association with individuals or groups organized with an attempt to influence Port policy that will benefit themselves or their cause at the exclusion of the Port at large.

3.12 Commission-Staff Relations. Commissioners may not attempt to exercise individual authority over the Port or staff, except as explicitly set forth and authorized in Commission policies, including the Delegation Policy referenced in Section 1.3.

3.13 Open Meetings. In accordance with Washington's Open Public Meetings Act, Commissioners shall:

3.13.1 Not meet as a quorum outside of Commission-called public meetings to hold discussions or make decisions, as defined under chapter 42.30 RCW, regarding the business of the Port.

3.13.2 Not meet as a quorum with staff outside of a Commission-called public meeting for the purpose of gathering information.

3.13.3 Understand that the requirements of the Washington Open Public Meetings Act apply to communications via telephone, e-mail, instant messaging or other forms of electronic communications. Any exchange of communication between any two Commissioners may constitute an official meeting of the Commission and be in violation of the Act. Commissioners may send information to other members of the Commission on an informational basis; however, replies and/or exchanges of communications regarding Port business must not occur outside of an official public meeting of the Commission. Any such e-mail sent for informational purposes as described above, by any member of the Commission,



shall be sent individually, not as group e-mail. Commissioners will not "reply" to any e-mail received by another member of the Commission.

3.13.4 Respect the confidentiality appropriate to issues, including personnel, real estate transactions, proprietary matters, and attorney-client privileged communications, including those requirements listed under RCW 42.30.110, Executive Sessions, and including any other confidential information gained by reason of the Commissioner's position. See also RCW 42.23.070(4) prohibiting disclosure of confidential Port information.

3.14 Commission Disclosure of Economic Associations. RCW 42.23.070 states in part that "[n]o municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein." Port contracts made in violation of the law are void; and any Port officer violating the law is liable to the Port for a "penalty in the amount of five hundred dollars, in addition to such other civil or criminal liability or penalty." RCW 42.23.050. The law also prohibits a Commissioner from employment or engaging in any professional activity that may require disclosure of Port information to non-Port interests. RCW 42.23.070. These statutory prohibitions are based on the principle that a Port official may not have divided loyalties. The line between proper and improper conduct may not always be clear, and even unintentional conduct may expose the Port and Port officers and employees to liability. See *City of Raymond v. Runyon*, 93 Wn. App. 127 (1998) ("In spite of well-intentioned attempts to avoid a prohibited conflict of interest," city commissioner found in violation of law). These Rules attempt to address a Commissioner's responsibility under law and duty of loyalty to the Port, with other interests. See also, Section 3.2.

3.14.1 Under chapter 42.23 RCW, no Commissioner may have an economic association (affiliation, involvement, or interest), directly or indirectly, that may conflict with the Commissioner's official duties as a Port Commissioner. However, Commissioners may engage in other employment or activity only so long as it does not interfere or conflict with their duties as a Commissioner.

3.14.2 In order to avoid inadvertent violation of law, and consistent with the Port's policy for its officers and employees, on or before April 15 of each year, or within fourteen (14) days of taking office, each Port Commissioner, shall file with the Port a written statement identifying any current or prospective economic relationship, whether direct or indirect, which could be a conflict of interest, a remote interest or give rise to an appearance of a conflict of interest with the Port. In addition, each Port Commissioner shall in the written statement disclose other employment and/or business relationships in order that the Port may confirm that there are no Commissioner conflicts or potential conflicts of interest with current or prospective Port activities. The statement shall include the name of the employing or business, the nature of services rendered, the time commitments, the location of the performance of such services and the amount of compensation (and expense reimbursement) received for such services. This Section 3.14.2 shall also apply to any employment or business of a Commissioner's spouse, in the absence of a separate property agreement.

3.14.3 The Commissioner shall declare his or her intention to refrain from deliberations and voting on issues related to the person or entity in such relationship. This requirement may be extended by Commission action to any individual or entity that, in the judgment of the Commission, could represent the potential for or the appearance of a conflict of interest. Even with disclosure, chapter 42.23 RCW may prohibit the Commission from acting in the face of a conflict of interest.

3.14.4 A Commissioner shall not receive reimbursement for expenses, per diem, or other Port payment for activities (e.g., travel, meals and other costs) when the Commissioner is engaged in or participating for both the Port and another Entity.

#### 4. FULL TRANSPARENCY IN PORT ACTIONS

4.1 This policy shall ensure full, fair, and open discussion of matters of public importance, with opportunity for public participation and media coverage.

4.2 With respect to any quasi-judicial matter before the Commission, or reasonably expected to come before the Commission, it is the policy of the Port Commission that no Commissioner shall:

4.2.1 Have contact with any person, either oral, written, electronic or otherwise communicated, except in a Commission meeting; and

4.2.2 Receive any information or evidence except as a part of the public record at a Commission meeting.

4.3 If a Commissioner is not able to avoid contact with parties outside of an open Commission meeting or receipt of information from parties outside of an open Commission meeting, the Commissioner shall disclose at the next public meeting, the full content of the contact made or information received.

4.4 Avoidance of communications described above is preferred over relying on the public disclosure remedy because an incomplete or inaccurate conveyance of the contact, even if inadvertent, may bias the outcome and subject the Commission action to challenge.

4.5 All information any person or entity would like distributed to Commissioners should be first provided to Port staff; staff will then consistently distribute the information to all Commissioners and file the information as appropriate.

#### 5. REPORTING MISCONDUCT

5.1 General. The Port is committed to lawful and ethical behavior in all of its activities and requires its staff and Commissioners to conduct themselves in a manner that complies with all applicable laws, regulations and this policy. Complaints against staff (other than the Executive Director) shall be resolved by the Executive Director, according to law and the Port Policies and Procedures manual. Complaints against the Executive Director shall be resolved by the Port Commission according to applicable contract, Delegation of Authority and

the Port Policies and Procedures manual. Complaints against Commissioners shall be resolved as set forth below.

5.2 Complaint. If any person believes that a Commissioner has engaged in misconduct, the Executive Director shall investigate consistent with Section 5.3 and report to the Commission. No employee will be discharged, threatened, or discriminated against in any manner for following up on any complaint or for reporting what they perceive to be misconduct. All complaints must include a description of the alleged misconduct. The proceedings shall be treated confidentially, including the name of the complainant, except to the extent required to complete any investigation and in the event that an action is taken.

5.3 Initial Determination. Based upon the complaint, and only following investigation and with the advice and counsel of Port general or special legal counsel ("Port counsel"), the Executive Director shall determine whether sufficient evidence exists to proceed with an investigation. If the Executive Director determines that insufficient evidence exists, the complaint shall be dismissed. Otherwise, the Executive Director shall proceed as follows.

5.4 Investigation. If an investigation is warranted, the Executive Director shall recuse himself from the process and delegate all further steps to Port counsel, and/or an investigator retained for such purpose by Port counsel. Port counsel shall inform the party subject of the complaint (Respondent) in writing that a complaint has been filed and that an investigation will take place. Port counsel shall provide a copy of the complaint to the Respondent and the Respondent shall have a reasonable time to prepare and submit a response in writing. Port counsel may seek additional information regarding the matter from the complainant, the Respondent and/or relevant third parties. In conducting the investigation and evaluating all evidence, the Port's counsel shall presume that the Respondent acted ethically and shall determine that an act of professional misconduct has occurred only upon a finding of substantial evidence of such misconduct.

5.5 Determination and Recommendation. Port counsel shall evaluate the complaint and issue a decision within thirty (30) days of receiving all relevant evidence, that the complaint is substantiated or unsubstantiated. If Port counsel finds misconduct and the complaint substantiated, a report to Executive Director and the Commission shall set forth the basis for the decision and a recommended action; otherwise, the complaint shall be dismissed.

5.6 Notification of Determination. Following receipt of the decision and recommendation of Port counsel, the Commissioners shall promptly hear, consider and vote upon the recommended action. The complainant and Respondent shall be notified of the action in writing and shall have the right to be heard before the Commission.

5.7 Reconsideration. A decision is subject to reconsideration upon written request by a respondent. But the sole ground for reconsideration shall be that the Respondent has new, relevant information which was not considered by Port counsel. A respondent having new information to submit to the Commissioners may, within fifteen (15) days of receipt of the written notice of determination, file with the Commission a written request for reconsideration stating the reason and including the new information not considered by the Port counsel. Following review of the entire investigative file, the decision and recommendation of the Port

counsel and the new information submitted by a respondent, the Commission shall, within fifteen (15) days of receipt of such new information, hear, consider or render a final decision which may not be further appealed. If the complaint is dismissed, the complainant and the Respondent shall be notified of same in writing. If reconsideration is denied, the Respondent, but not the complainant, shall be notified of same in writing, and any action by the Commission shall be implemented immediately.

5.8 Sanctions. Censure and/or reprimand may be invoked with respect to Commissioner misconduct, in addition to reassignment of committee assignments and other actions.

5.9 Public Notification. Unless otherwise determined by the Commission in a particular matter, it shall be standard procedure to publish, in a manner deemed appropriate by the Commission, the fact of any sanction.

5.10 Other Remedies Reserved. Any action taken by the Commission shall not prevent other legal action that may be available under law. The Port shall not indemnify or defend any Commissioner charged with misconduct, except as otherwise provided under Section 18.

## 6. COMMISSION MEETINGS

6.1 Presiding Officer. The Presiding Officer at all meetings of the Commission is the President, and in the absence of the President, the Vice President will act in that capacity.

6.2 Presiding Officer Duties. The Presiding Officer shall:

6.2.1 Preserve order and decorum in the Commission chambers;

6.2.2 Observe and enforce all rules adopted by the Commission;

6.2.3 Decide all questions on order, in accordance with these rules, subject to appeal by a Commissioner;

6.2.4 Recognize Commissioners in the order in which they request the floor. Except as otherwise set forth herein, the Presiding Officer, as a Commissioner, shall have only those rights, and shall be governed in all matters and issues by the same rules and restrictions as other Commissioners; and

6.2.5 Have the authority to appoint Commissioners or the public to serve on ad hoc committees, task forces and any advisory boards, with input from fellow Commissioners.

6.3 Regular Meeting. Port meetings are held on the second and fourth Tuesdays of each month in the Commission Chambers, 350 Clover Island Drive, Suite 200, Kennewick, Washington at 2:00 p.m.

6.4 Special Commission Meetings. A special public meeting of the Commission may be called by the President or by any two Commissioners. Any request and subsequent special

meeting notices shall state the subjects (e.g., agenda items) to be considered at such special meeting and no other subject shall be acted upon.

The Port Administrative Assistant shall provide notice of special Commission meetings pursuant to applicable law.

6.5 Quorum. At all meetings of the Commission, a majority of the Commission (two members) constitutes a quorum for the transaction of business, but a lesser number may adjourn from day to day or until the time of the next regular meeting.

6.6 Recording Proceedings. The Port Administrative Assistant shall maintain an account of all proceedings of the Commission in accordance with statutory requirements. Port meeting minutes can be corrected but shall not be revised without a majority affirmative vote of the Commission at a regularly scheduled Commission meeting.

6.7 Call to Order. The Presiding Officer shall call each meeting to order. The Presiding Officer will announce the attendance of Commissioners and indicate any Commissioner who is not in attendance.

6.8 Participation by Telephone. The Commission strongly believes that a Commissioner's first priority shall be to the District's constituents as a whole and that this obligation is best fulfilled by direct, face-to-face participation in public meetings rather than via telephone or other medium. Such policy provides access by the public to the Commission, provides for better understanding by the public of the deliberative process, minimizes miscommunication, ensures that each Commissioner sees all applicable documents and sees all in attendance. Therefore, the Commission, in furtherance of its long-standing policy of transparency in governance, hereby prohibits the use of attendance at Commission meetings via telephone or other media.

6.9 Commissioner Attendance at Meetings. Commissioners shall inform the President or Executive Director if they are unable to attend any Commission meeting, or if they will be late to any meeting. A majority vote is required to excuse any Commissioner's absence. Unless excused, pursuant to RCW 53.12.140 a Commissioner forfeits office by nonattendance at meetings of the Commission for a period of sixty (60) days. The Executive Director shall maintain a record of Commissioner attendance at Commission, and other meetings, to which a Commissioner is assigned or scheduled to attend.

6.10 Commission Meeting Staffing. The Executive Director shall attend all meetings of the Commission, unless excused. At the discretion of the Executive Director, other staff members shall attend. The Executive Director may make recommendations to the Commission and shall have the right to take part in the discussions of the Commission, but shall have no vote.

6.11 General Conduct of Business.

6.11.1 The President of the Port Commission will introduce the issue, stating whether action will be taken on the issue, whether the issue is introduced for discussion only or whether other results are anticipated.

6.11.2 Port staff will briefly discuss the issue.

6.11.3 If a technical report by a consultant or other is to be presented, the presenter will provide a summary of the technical report, generally not to exceed 15 minutes.

6.11.4 At the conclusion of the technical report, staff will return the issue to the President of the Commission for action. The Commissioners may ask staff, any consultants or the public to briefly clarify any matter presented.

6.12 Public Comment. Public comment shall be permitted at Commission meetings only in accordance with these established procedures. Comments shall be received at the beginning of each meeting, and at the end of each meeting, as identified on the agenda. Either the President or staff may read the following guidelines into the record.

6.12.1 Speakers shall move to the lectern and shall comment only after being recognized by the President;

6.12.2 Speakers shall state their names and addresses prior to addressing the Commission;

6.12.3 The President may allocate available time among individuals wishing to comment. Generally, the time shall be 3 minutes for each speaker;

6.12.4 Groups are encouraged to express their views through a single spokesperson rather than individually;

6.12.5 Speakers shall limit themselves to matters regarding the issue of concern;

6.12.6 Speakers shall not repeat remarks or points of view made by prior speakers;

6.12.7 The President may overrule impertinent, redundant or disruptive comments;

6.12.8 Applause or other disturbances are discouraged;

6.12.9 All remarks should be directed to the President; and

6.12.10 Individuals should not expect the Commission, staff, consultants, other speakers or any other person, to respond to their comments. Instead, the Commission may direct the matter to staff for comment at a future meeting or for Commission consideration at a future meeting.

6.13 Executive Sessions. Executive Sessions shall be held in accordance with the provisions of the Washington State Open Public Meetings Act. An Executive Session is a Commission meeting that is closed except to the Commission, Executive Director and others that may be authorized. The public is restricted from attendance. Executive Sessions may be held during Regular or Special Commission meetings and will be announced by the President. Before

convening an Executive Session, the President shall announce the purpose of the meeting and the anticipated time when the session will be concluded. Should the session require more time, a public announcement shall be made that the executive session is being extended.

6.14 Commission Discussion. All Commission discussion shall be guided by Robert's Rules of Order, Newly Revised. The Port Attorney shall assume the additional duty of Parliamentarian.

6.15 Media Representation at Commission Meetings. All public meetings of the Port shall be open to the media, freely subject to recording by radio, television, electronic, and photographic services at any time, provided that such arrangements do not interfere with the orderly conduct of the meeting.

## 7. AGENDA PLANNING

The work of the Commission is accomplished in public meetings and all proceedings of the Commission shall be by motion or resolution, recorded in its minute books, which shall be public records. The agenda of the public meeting identifies in general terms the topics to be considered by the Commission.

7.1 Placing Item on the Agenda. Items may be placed on either the business agenda or on the consent agenda. An item may be placed on the preliminary Commission meeting agenda by any Commissioner or by the Executive Director.

7.2 Agenda Preparation. The Executive Director shall prepare a preliminary agenda for each Commission meeting. The preliminary agenda shall set forth a brief general description of each item to be considered by the Commission. The Executive Director shall promptly forward the preliminary agenda to the Presiding Officer for review. The Presiding Officer shall have the option to delete any item from the preliminary agenda. The Presiding Officer shall, at the next commission meeting, report any deleted item to the full Commission and the full Commission shall determine whether the item shall be placed on a subsequent agenda.

7.3 Agenda Materials. Agenda materials will be available on the Friday prior to the Commission meeting. Agenda materials will be delivered to Commissioners.

7.4 Adding an Item to a Published Agenda. An item may be placed on a regular Commission meeting agenda after the agenda is closed and the notice published, if the Commissioner or Executive Director explains the necessity and receives a majority vote of the Commission at a public meeting.

7.5 Agenda Item Order. The Presiding Officer may, with the concurrence of the Commission, address agenda items out of order.

7.6 Consent Agenda. Items placed on the consent agenda may be moved to the business agenda upon motion passed by the Commission during a Commission Meeting and prior to the vote to approve the consent agenda. The moved item will be placed on the business agenda for further discussion.

## **8. ROLE OF THE COMMISSION PRESIDENT**

The President of the Commission shall:

8.1 Ensure that the Commission jointly and consistently adheres to its own rules and policies, and those imposed upon it by the laws of the State of Washington.

8.2 Ensure that deliberation is fair, open and thorough, but also timely, orderly and stays on topic. The President of the Commission shall preside over and facilitate all Commission Meetings in accordance with these governance principles and Roberts Rules of Order, as needed.

8.3 Assume responsibility of the Commission that is not specifically assigned to another Commissioner.

8.4 Call Special Meetings of the Commission in the event of a business need as provided for by applicable law.

8.5 Establish ad hoc advisory and standing committees.

8.6 Schedule and coordinate the annual process of evaluating the Executive Director.

8.7 Have no authority to supervise or administratively direct the Executive Director or Port staff, apart from authority expressly granted by the Commission.

## **9. ROLE OF THE COMMISSION VICE-PRESIDENT**

The Vice-President of the Commission shall:

9.1 Perform such duties as are assigned by the President.

9.2 Have all the power and duties of the President in the absence or inability of the President to act.

9.3 Have all the powers and duties of the Secretary in the absence or inability of the Secretary to act, when not acting as the President.

## **10. ROLE OF THE COMMISSION SECRETARY**

The Secretary of the Commission shall:

10.1 Attest all contracts, bonds, deeds, leases and other instruments and documents duly authorized by the Commission unless otherwise delegated by the Commission.

10.2 Perform all duties incident to the office of Secretary as may from time to time be required by law or assigned to such office by motion, rule or resolution of the Commission.

10.3 Have all of the powers and duties of the President in the absence or inability of both the President and the Vice President to act.



10.4 Have the option of delegating the obligations and duties of Secretary to the appropriate Port staff member for implementation.

## 11. COMMISSION COMMITTEES

11.1 General. The Commission President may establish ad hoc advisory and standing committees. All committees should include designation of members, chair and a charter describing the committee's purpose. The Commission President will review each committee at least annually to determine whether the committee should continue.

### 11.2 Committee Roles and Responsibilities.

11.2.1 Committees will assist the Commission by gaining education, considering alternatives and implications, and preparing policy alternatives.

11.2.2 Commission committees or any individual Commissioner may not speak or act for the Commission, except when formally given such authority for specific and time-limited purposes.

11.2.3 Commission committees cannot exercise authority over staff or interfere with the delegation from the Commission to the Executive Director.

11.2.4 Participation in committee meetings shall be in compliance with the provisions of the Open Public Meetings Act, when two or more Commissioners are present, or the committee is acting for the Commission. In such event, the committee meeting must be properly noticed as a public meeting.

11.2.5 These policies apply to any group which is formed by action of the Commission President, whether or not it is called a committee.

## 12. COMMISSION AND PORT ACTION

12.1 Only decisions of the Commission acting as a body are binding upon the Port and Port staff.

12.2 In the case of Commissioners requesting information or assistance without Commission authorization, the Executive Director and staff must refuse such requests that require, upon evaluation by the Executive Director, a material amount of staff time or funds, are disruptive to the Port, or which may involve a conflict of interest between the Port and the Commissioner requesting the information or assistance.

12.3 Commissioners individually may communicate directly with Port employees or contractors for the purpose of inquiry only. Commissioners shall, on business matters, deal with staff through the Executive Director. However, the Commission as a body and the Commissioners individually do not give direction to persons who report directly or indirectly to the Executive Director. If an individual Commissioner is dissatisfied with the response from the Executive Director or staff, the Commissioner may seek resolution through the Commission as a body.

12.4 The Commission as a body and the Commissioners individually will refrain from evaluating, either formally or informally, the job performance of any Port employee, other than the Executive Director, except when approving compensation and benefits in the course of budget or employment contract considerations.

### 13. PORT COMMISSION & STAFF ROLES AND RESPONSIBILITIES

13.1 General Roles. The Commission is the Port's governing authority and policy maker. The Executive Director and Port staff implement and administer the Commission's policies. The Port of Kennewick has a Commission-Executive Director form of governance. With this structure, the Port Commission's role is to establish port policies and priorities. The Commission hires an Executive Director to implement those policies and undertake the administration of the organization. The Executive Director is hired by the Port Commission to enforce its directives, to direct the daily operations of Port governance, to prepare and monitor the budget, and to implement the policies and programs initiated by the Port Commission. The Executive Director is responsible to the Port Commission, rather than to individual Commissioners, and directs and coordinates all other employees. The Port Commission authorizes positions through the budget process; based upon that authorization, the Executive Director is responsible for hiring all personnel.

13.2 Commissioner's Role. [See also, Section 2.] The Executive Director is authorized to make recommendations on policy matters to the Commission and the Commission retains the authority to accept, reject, or amend the recommendations. Individual Commissioners may not intervene in staff decision-making, scheduling of work, and executing department priorities. This is necessary to allow staff to execute priorities given by the Executive Director. All Commissioners with concerns affecting the Port of Kennewick should address those concerns with the full Commission or with the Executive Director.

No Commissioner shall direct the Executive Director to initiate any action, prepare any report, or initiate any project or study without the authorization of a majority of the Commission. Commissioner requests for information shall be made to the Executive Director, unless otherwise determined by the Executive Director. Commissioners needing staff assistance shall work through the Executive Director.

#### 13.3 Executive Director's Role.

13.3.1 The Executive Director is the chief administrative officer of the Port. The Executive Director is directly accountable to the Port Commission for the execution of the Port Commission's policy directives as set forth in the Delegation Policy and for the administration and management of all Port activities and staff.

13.3.2 The Executive Director is the administrator and manager of all Port activities and staff; and the information liaison between Commission and Port staff. Requests for information from Commissioners are to be directed to the Executive Director and will be responded to promptly. The information requested will be copied to all members of Commission so that each member may be equally informed. The Executive Director will provide staff support for Commissioners as appropriate in their official roles.

13.3.3 In addition to regular, comprehensive memoranda written by the Executive Director directly to the Port Commission concerning aspects of Port operations (exclusive of confidential personnel issues), all Commissioners shall receive copies of correspondence received by the Executive Director that will assist them in their policy-making role. The Executive Director also provides other documents to the Commission on a regular basis, such as status reports, executive summaries, and minutes of meetings.

13.3.4 The Executive Director shall have an open-door policy which allows individual Commissioners and the public to meet with the Executive Director on an impromptu, one-on-one basis. Such meetings are highly encouraged. No Commissioner, person or special interest group shall abuse the open-door policy.

13.4 Staff Role. The Commission recognizes the primary functions of staff as 1) executing the policies and actions taken by the Commission as a whole, and 2) keeping the Commission informed. Staff is obligated to take guidance and direction from the Executive Director or appropriate supervisor. This direction follows the policy guidance from the Port Commission to the Executive Director through the Delegation Policy. Port staff will, acting through the Executive Director, make every effort to respond in a timely and professional manner to all individual Commissioner's requests for information or assistance; providing, in the judgment of the Executive Director, the request is not of such magnitude (in terms of workload, resources, or policy) that it should instead be assigned to the Executive Director through the direction of the full Port Commission.

13.5 Summary. The following is a brief summary from the Washington Public Port Association ("WPPA") Commissioner Resource Guide, and identifies parallel leadership roles and responsibilities.

***Port Commission***

Governs:

Guides

Directs

Decides what

Requests information

Considers issues

Creates, reviews and adopts policy

Reviews and monitors plans

Monitors progress

Contracts with personnel

Approves evaluation criteria, procedures

Reviews and approves budget

Represents public interest

***Executive Director***

Administers:

Operates

Manages

Decides how

Seeks and provides information

Provides recommendations

Recommends and carries out policy

Implements plans

Reports progress

Supervises hiring process, practices

Supervises and evaluates personnel

Formulates budget

Acts in the public's interest

**14. BUDGET AND PROCUREMENT AUTHORITY**

14.1 General. By resolution, the Commission shall set forth the authority of the Executive Director to manage and expend Port funds in accordance with financial policies and budgetary limits. Procurement of goods and services shall take place in accordance with applicable legal requirements in a fair, competitive and inclusive manner to maximize the benefit to the Port's taxpayers/customers.

14.2 Financial Policies. The Commission, by resolution, shall adopt financial policies that provide guidance to the Executive Director in managing the finances of the Port and in developing budgets, financial plans and rates. At a minimum, these policies shall:

14.2.1 Provide for sufficient liquidity relative to the Port's risk profile;

14.2.2 Provide for adequate coverage to meet debt covenants;

14.2.3 Establish criteria for debt and rate – financed capital expenditures;

14.2.4 Require that budgets be developed based on conservative and prudent assumptions consistent with standard industry practice; and

14.2.5 Establish budgetary and procurement controls over expenditures.

14.3 Budgetary Authority. As required by and consistent with law, the Commission, by resolution, shall approve the Port's budget prior to the start of each calendar year. The Executive Director shall manage the Port's operations within the approved budget levels consistent with authority levels set forth in the financial policies.

14.4 Procurement Authority.

14.4.1 The Commission, by resolution, shall establish procurement authorities and guidelines for the Executive Director consistent with state laws and regulations. The Executive Director shall establish procurement controls that provide reasonable assurance that the procurement of goods and services are made for a valid business purpose and within authorized budget levels.

14.4.2 It is Port policy that procurement decisions shall be made free from actual or perceived conflicts of interest consistent with these Rules of Policy and Procedure.

14.4.3 It is Port policy that due diligence and prudent judgment be exercised in the making of procurement decisions, including conducting a risk assessment. If the Executive Director reasonably determines that a procurement activity presents, regardless of the size of the financial commitment, either: (1) a unique and significant operational risk to the Port; or (2) a significant impact to customers, the Executive Director shall inform the Commission.

## 15. EVALUATING THE EXECUTIVE DIRECTOR'S PERFORMANCE

15.1 General. The Executive Director's job performance shall be evaluated by comparing the organization's operations and results and the Executive Director's performance to the policies established by the Commission.

15.2 Process.

15.2.1 The Commission shall evaluate the Executive Director's performance on an annual basis.

15.2.2 The evaluation will be based on an evaluation of the organization's performance and the Executive Director's personal performance against the evaluation criteria previously established by the Commission and the Executive Director.

## 16. COMMISSION-AUDITOR RELATIONSHIP

16.1 General. The Port Auditor (Auditor) serves the Port to assist in the Port's compliance with the Local Government Accounting Act, RCW 43.09.200 – 43.09.2855.

### 16.2 Hiring and Reporting.

16.2.1 The Executive Director shall hire the Auditor. The Auditor shall perform those duties specified in RCW 43.09.240, Port Policy or job description and shall be granted direct access to the Commission as necessary in the performance of these duties.

16.2.2 The Auditor shall report through the Executive Director or designee for all administrative matters, including hiring, performance evaluations, salary administration, employee benefits, and terminations. The Executive Director may assign additional duties to the Auditor as long as these duties do not interfere with the Auditor's duties as specified by law.

## 17. COMMISSION-PORT ATTORNEY RELATIONSHIP

17.1 Port Attorney Role. The Executive Director is responsible for hiring and terminating the Port Attorney. The Executive Director shall make provision for and appoint legal counsel for the Port by any reasonable contractual arrangement for such professional services. The Port Attorney is the legal advisor to the Port, the Commission, its committees, commissions and boards, the Executive Director, and all Port officers and employees with respect to any legal question involving an official duty or any legal matter pertaining to the affairs of the Port. It is important to note that the Port Attorney does not represent individual members of Commission, but rather the Port Commission as a whole. The Port Attorney reports to the Executive Director. The Executive Director is responsible for evaluating the Port Attorney's performance.

### 17.2 Port Attorney Responsibilities.

The general legal responsibilities of the Port Attorney are to:

17.2.1 Provide legal assistance necessary for formulation and implementation of legislative policies and projects.

17.2.2 Represent the Port's interest, as determined by the Executive Director, in litigation, administrative hearings, negotiations, and similar proceedings.

17.2.3 Prepare or approve as to form resolutions, contracts, and other legal documents to best reflect and implement the purposes of the Port.

17.2.4 Keep the Port Commission and staff apprised of court rulings and legislation affecting the legal interest of the port.

17.2.5 Shall advise the Commissioners regarding potential conflict of interest issues or ethical matters. Port Attorney shall provide assistance to individual Commissioners in complying with applicable statutes and laws only when such advice does not conflict with the Port Attorney's obligations to the Port or to specific direction of the Commission.

17.2.6 Give advice or opinion when required by the Commission or Executive Director.

17.2.7 Inform the Commission of material legal issues impacting the Port or the Commission.

17.2.8 Assist the Commissioners and staff in complying with applicable statutes and laws.

17.2.9 Serve as the parliamentarian at all commission meetings and other port-related meetings as requested by the Executive Director.

17.2.10 Other matters as designated by the Executive Director.

## 18. INDEMNIFICATION AND DEFENSE POLICY

18.1 Policy Stated. As authorized by RCW 4.96.041, there is hereby created a procedure to provide for indemnification and defense of claims of liability arising from acts or omissions of officials and employees of the Port, including volunteers, while performed or in good faith purported to have been performed in the scope of their official duties.

18.2 Definitions. Unless the context indicates otherwise, the words and phrases used in this chapter shall have the following meaning:

18.2.1 "Employee" means any person who is or has been employed by the Port, including volunteers and appointed members of advisory boards and commissions. "Employee" does not include independent contractors. "Employee" also includes an employee's spouse when an employee's marital community is named in any action subject to this policy.

18.2.2 "Official" means any person who is serving or has served as an elected Port Commissioner, and any person who is serving or who has served as an appointed officer of the Port as defined by RCW 42.23.020(2), as written or hereafter amended. "Official" does not include independent contractors performing the duties of appointed positions.

### 18.3 Legal Representation.

18.3.1 The Port shall provide to an official or employee, subject to the conditions and requirements of this chapter, and notwithstanding the fact that such official or employee may have concluded service or employment with the Port, such legal representation as may be reasonably necessary to defend a claim or lawsuit filed against such official or employee resulting from any conduct, act or omission of such official or employee performed or omitted on behalf of the Port in his/her capacity as a Port official or employee, which act or omission is within the scope of his/her service or employment with the Port. The provisions of this chapter

shall not operate to provide legal representation to defend a claim or lawsuit for any conduct, act, or omission resulting in the termination for cause of any official or employee.

18.3.2 The legal representation shall be provided by the office of the Port legal counsel and may include the Executive Director engaging the services of outside legal counsel. If any provision of an applicable policy of insurance provides legal counsel for the employee or official, the Port legal counsel will work with the policy holder for purposes of obtaining legal representation under the existing insurance policy.

18.3.3 In the event that outside counsel is retained under Section 18.3.2, the Port shall indemnify the employee or official from the reasonable costs of defense; provided, that in no event shall the official or employee be indemnified for legal counsel's fees in excess of the hourly rates established by the Port's contract with legal counsel selected by the Port. The official or employee shall be liable for all hourly rates charged in excess of said rate.

18.3.4 The determination whether the official or employee was acting in good faith within the scope of his or her official duties shall be made by the Executive Director in consultation with the Port legal counsel and/or outside legal counsel. This determination shall be based on an investigation of the acts and circumstances surrounding the incident and shall be made as early in the proceedings as is reasonably possible. Once the determination is made, the official or employee involved shall be notified by the Executive Director in writing. If the employee or official involved is the Executive Director, the determination shall be made by the Commission in consultation with the Port legal counsel and/or outside legal counsel based on an investigation of the acts and circumstances surrounding the incident and shall be made as early in the proceedings as is reasonably possible. Once the determination is made, the Executive Director shall be notified by the Port legal counsel, in writing. In any claim involving an allegation of criminal conduct, no investigation by the Port will occur prior to a determination of guilt, or prior to a dismissal of the criminal charge with prejudice, so as not to compromise the official's or employee's Fifth Amendment right against self-incrimination. Any determination made under this Section shall not be subject to appeal.

18.4 Exclusions. Except as otherwise determined pursuant to Section 18.3, in no event shall protection be offered under this chapter by the Port to:

18.4.1 Any dishonest, fraudulent, criminal, willful, intentional or malicious act or course of conduct of an official or an employee;

18.4.2 Any act or course of conduct of an official or employee which is not performed on behalf of the Port;

18.4.3 Any act or course of conduct which is outside the scope of an official's or employee's service or employment with the Port; and/or,

18.4.4 Any lawsuit brought against an official or employee by or on behalf of the Port;

18.4.5 Any action or omission contrary to or not in furtherance of any adopted Port policy.

18.5 Reserved Rights. Nothing herein shall be construed to waive or impair the right of the Port to institute suit or counterclaim against any official or employee nor to limit its ability to discipline or terminate an employee.

18.6 Policy Secondary to Insurance. The provisions of this chapter shall have no force or effect with respect to any accident, occurrence or circumstance for the which the Port or the official or employee is insured from whatever source against loss or damage; provided that the provisions of this chapter shall apply in the event the loss or damages fall within the deductible or exclusion(s) of the Port's applicable insurance policy. The provisions of this chapter are intended to be secondary to any contract or policy of insurance whether owned by or otherwise applicable to any official or employee. The Port shall have the right to require an employee to fully utilize any such policy protection prior to requesting the protection afforded by this Chapter.

18.7 Determination of Exclusion. The determination whether an official or employee shall be afforded a defense by the Port under the terms of this chapter shall be made after a determination pursuant to Section 18.3 as to whether the official or employee was acting within the scope of his or her duties. The Executive Director and Port legal counsel shall prepare a recommendation to the Commission. The decision of the Commission shall be final as a legislative determination and shall be based upon a finding that an official or employee meets or does not meet the criteria of this chapter. Nothing herein shall preclude the Port from undertaking an official's or employee's defense under a reservation of rights. The determination as to whether a defense is to be furnished as provided under this chapter to a member or to members of the Commission shall be made without the vote of the Commissioners named in the claim or lawsuit unless the inclusion of such member or members is required for a quorum; provided, that if a claim or lawsuit affects a quorum or greater number of the members of the Commission, all such affected members shall retain their voting privileges under this Section.

18.8 Representation and Payment of Claims – Conditions. The provisions of this chapter shall apply only when all the following conditions are met:

18.8.1 In the event of any incident or course of conduct potentially giving rise to a claim for damages, or for the commencement of a lawsuit, the official or employee involved shall, as soon as practicable, give the employee's department director and, if applicable, the Port legal counsel and the Executive Director written notice thereof. The notice shall identify the official or employee involved, all information known to the official or employee involved with respect to the date, time, place and circumstances surrounding the incident or conduct giving rise to the potential claim or lawsuit, as well as the names and addresses of all persons allegedly injured or otherwise damaged thereby, and the names and addresses of all witnesses.

18.8.2 Upon receipt, the official or employee shall as soon as practicable deliver any claim, demand, notice or summons or other process relating to any such incident or conduct to the Port legal counsel and shall cooperate with the Port legal counsel, or if the Executive Director authorizes or designates another legal counsel to handle the matter, shall cooperate with that legal counsel, and, upon request, shall assist in making settlement of any suit and enforcing any claim for any right of subrogation against any persons or organizations that may be liable to the Port because of any damage or claim of loss arising from said incident or course of conduct,



including, but not limited to, rights of recovery for costs and legal counsel's fees arising out of state or federal statute upon a determination that the lawsuit brought was frivolous in nature. Failure to timely deliver any claim, demand, notice or summons to the Port legal counsel, and in which an adverse decision against the official, the employee or Port results from such failure, shall operate to negate all indemnification and opportunity for defense under this chapter and the Port shall have no obligation to offer a defense to the named official or employee.

18.8.3 Such official or employee shall attend interviews, depositions, hearings and trials and shall assist in securing and giving evidence and obtaining assistance of witnesses all without any additional compensation to the official or employee, and, in the event that an employee has left the employ of the Port, no fee or compensation shall be provided.

18.8.4 Such official or employee shall not accept nor voluntarily make any payment, assume any obligation, or incur any expense related to said claim or lawsuit, other than for first aid to others at the time of any incident or course of conduct giving rise to any such claim, loss or damage. Nothing herein shall be deemed to preclude any official or employee from retaining legal counsel to represent his/her interests relating to such claim or lawsuit; however, all costs and expenses incurred thereby shall be paid by the official or the employee.

18.8.5 Nothing herein shall modify existing procedures or requirements of law for processing and payment of claims against the Port.

18.9 Effect of Compliance With Conditions. If legal representation of an official or employee is undertaken by the Port, whether by the Port legal counsel or by legal counsel obtained by the Port or through its insurance coverage, and all of the conditions of representation are met, and a judgment is entered against the official or employee or a settlement is made, the Port shall pay such judgment or settlement according to the provisions herein; provided, that the Port may at its discretion appeal as necessary any such judgment. In no event shall this Section be interpreted to provide for payment of an award of punitive damages. The process for payment of punitive damages is discretionary under this chapter, and is set forth in Section 18.16. The decision to appeal an award of damages will be made by the Commission upon the recommendation of the Executive Director and the Port legal counsel and/or outside legal counsel.

18.10 Failure to Comply With Conditions. In the event that any official or employee fails or refuses to comply with any of the conditions set forth in Section 18.8, or elects to provide his/her own representation with respect to any such claim or litigation, then all of the provisions of this chapter shall be inapplicable and shall have no force or effect with respect to any such claim or litigation.

18.11 Reimbursement of Incurred Expenses.

18.11.1 If the Port's investigation under Section 18.3 determines that an official or employee does not come within the provisions of this chapter and a court of competent jurisdiction later determines that such claim does come within the provisions of this chapter, then the Port shall pay any judgment, excepting punitive damages, rendered against the official or employee and reasonable legal counsel's fees incurred in defending against the claim if said

judgment is not covered by the Port's insurance provisions or by the official's or employee's insurance. The Port shall pay any costs and reasonable legal counsel's fees incurred by the employee or official in obtaining the determination that such claim is covered by the provisions of this chapter; provided, that if a court of competent jurisdiction determines that such claim does not come within the provisions of this chapter, then the official or employee shall pay the Port's costs and reasonable legal counsel's fees incurred in obtaining the determination that such claim is not covered under the provisions of this chapter.

18.11.2 If the Port determines that a claim against a Port official or employee does come within the provisions of this chapter and a court of competent jurisdiction later finds that such claim does not come within the provisions of this chapter, then the Commission shall have the option of requiring reimbursement by the official or employee for costs or expenses incurred in obtaining the determination that such claim is not covered by the provisions of this chapter.

18.12 Conflict With Provisions of Insurance Policies. The indemnification provisions of this chapter do not constitute a policy of insurance and nothing contained in this chapter shall be construed to modify or amend any provisions of any policy of insurance where the Port or any of its current or former officials or employees thereof is the named insured. In the event of any conflict between this chapter and the provisions of any such policy of insurance, the policy provisions shall be controlling; provided, however, that nothing contained in this chapter shall be deemed to limit or restrict any employee's or official's right to full coverage pursuant to this chapter, it being the intent of this chapter to provide the coverage detailed in this chapter only above and beyond insurance policies which may be in effect while not compromising the terms and conditions of such policies by any conflicting provisions contained in this chapter.

18.13 Pending Claims. The provisions of this chapter shall apply retroactively to any pending claims or lawsuits against any official or employee at the time of adoption of this ordinance and to any such claims or lawsuits hereinafter filed within an applicable statute of limitations, irrespective of the date of the events or circumstances which are the basis of such claim or lawsuit.

18.14 Modification of Chapter. The provisions of this chapter shall be subject to amendment, modification and repeal, at the sole discretion of the Commission, provided that unless explicitly set forth, any such amendment, modification or repeal shall apply prospectively only and shall have no effect on the obligation of the Port to indemnify and/or defend against any claim which is based, in whole or in part, upon any action or omission of an employee or official occurring prior to the effective date of the amendment, modification or repeal.

18.15 Bargaining Unit Contracts. If a union contract under chapter 41.56 RCW covers any of the provisions of this chapter, all employees under such contract shall be governed by the provisions thereof, rather than by the provisions of this chapter, and where any conflict exists between the provisions of any such contract and this chapter, such contract shall control.

18.16 Punitive Damages. When an employee or official of the Port has been represented in a claim and/or litigation by the Port pursuant to this chapter and any judgment is rendered against such employee or official for punitive damages, the employee or official may make a request to the Commission that the Port pay the award of punitive damages on behalf of

the official or employee. Upon receiving a request made by or on behalf of a Port employee or official to pay punitive damages, the Commission shall receive a report and recommendation from the Executive Director and the Port legal counsel. If the official or employee is the Executive Director or a Commission member, the Commission may request a report and recommendation from the Port legal counsel or may retain the services of another person or agency to provide a recommendation. Following receipt of the report and any recommendation, the Commission shall determine whether the best interests of the Port and justice will be served by payment by the Port of the award for punitive damages. There shall be no appeal from such determination. The Executive Director shall communicate the council's determination with respect to the employee's or official's request for payment of punitive damages to said employee or official. Thereafter, the finance director shall prepare the payment of punitive damages if the council authorized such payment.

#### 18.17 Application to Recall Proceedings.

18.17.1 Consistent with RCW 4.96.041(3), the necessary expenses of defending a Port Commissioner in a judicial hearing to determine the sufficiency of a recall charge as provided in RCW 29.82.023 shall be paid by the Port if the Commissioner requests such defense and approval is granted by both the Commission and the Port's legal counsel or attorney appointed by the Executive Director to review the request. The expenses paid by the Port may include costs associated with an appeal of the decision rendered by the superior court concerning the sufficiency of the recall charge.

18.17.2 As authorized by the Supreme Court in the case of *In Recall of Olsen*, 154 Wn.2d 606 (2005), the Port's decision to indemnify and pay the costs of a recall defense does not constitute a contract under RCW 42.23.030, and, as a result, a Commissioner requesting payment of such expenses may vote on the Commission's consideration of the request.

### 19. GENERAL COMPLAINT RESOLUTION

19.1 Administrative Complaints Made Directly to Individual Commissioners. When administrative policy or administrative performance complaints are made directly to individual Commissioners, the Commissioner shall then refer the matter directly to the Executive Director for review and/or action. The individual Commissioner may request to be informed of the action or response made to the complaint.

19.2 Administrative Complaints – "Best Practice." Although citizen's direct access to elected officials is to be encouraged, Port Commissioners should be cautious in making statements or taking actions that may delay a timely customer service response. The best policy is to put the citizen into direct contact with the Executive Director.

***Ten Commandments for Staying out of Trouble as a Port Commissioner***

[as presented in the WPPA Commissioner Resource Guide]

1. Thou shalt never spend the public's money in secret.
2. Thou shalt not accept personally more money or benefits than any other fellow commissioner.
3. Thou shalt not require the port staff to do more work than necessary to inform (please) you when they could be occupied in improving the business of the port.
4. Thou shalt not speak as the official spokesperson of the port without knowing officially that you have been so designated by the commission majority.
5. Thou shalt not use the press against your fellow commissioners.
6. Thou shalt not use port property for unofficial business, not even a paper clip. Paper clips are cheap, buy your own. Use your own car too.
7. Thou shalt not argue with, grill, or embarrass port staffers in public. They'll hate you for it and get back at you in a thousand ways without your ever knowing it or leaving a scrap of evidence.
8. Thou shalt not depend on news media to keep the public informed of the activities and purposes of the port. Have your own PR program and carry it out.
9. Thou shalt not align yourself closely with a certain group of port tenants or users. Your motives will always be aligned with that group regardless of the issues. And the group will turn on you if you don't support them every single time.
10. Thou shalt not become involved in hiring anyone but the port manager and the port auditor.

## **EXHIBIT 3**

## 5. REPORTING MISCONDUCT

5.1 General. The Port is committed to lawful and ethical behavior in all of its activities and requires its staff and Commissioners to conduct themselves in a manner that complies with all applicable laws, regulations and this policy. Complaints against staff (other than the Executive Director) shall be resolved by the Executive Director, according to law and the Port Policies and Procedures manual. Complaints against the Executive Director shall be resolved by the Port Commission according to applicable contract, Delegation of Authority and the Port Policies and Procedures manual. Complaints against Commissioners shall be resolved as set forth below.

5.2 Complaint. If any person believes that a Commissioner or Commissioners have engaged in misconduct, the Executive Director shall investigate consistent with Section 5.3 and report to the Commission. No employee will be discharged, threatened, or discriminated against in any manner for following up on any complaint or for reporting what they perceive to be misconduct. All complaints must include a description of the alleged misconduct. The proceedings shall be treated confidentially, including the name of the complainant, except to the extent required to complete any investigation and in the event that an action is taken.

5.3 Initial Determination. Based upon the complaint, and only following investigation and with the advice and counsel of Port general or special legal counsel ("Port counsel"), the Executive Director shall determine whether sufficient evidence exists to proceed with an investigation. If the Executive Director determines that insufficient evidence exists, the complaint shall be dismissed. Otherwise, the Executive Director shall proceed as follows.

5.4 Investigation. If an investigation is warranted, the Executive Director shall recuse himself from the process and delegate all further steps to Port counsel, and/or an investigator retained for such purpose by Port counsel. Port counsel shall inform the party/ies subject of the complaint (Respondent(s)) in writing that a complaint has been filed and that an investigation will take place. Port counsel shall provide a copy of the complaint to the Respondent(s) and the Respondent(s) shall have a reasonable time to prepare and submit a response in writing. Port counsel may seek additional information regarding the matter from the Complainant, the Respondent(s) and/or relevant third parties. In conducting the investigation and evaluating all evidence, the Port's counsel shall presume that the Respondent(s) acted ethically and shall determine that an act of professional misconduct has occurred only upon a finding of substantial evidence of such misconduct.

5.5 Determination and Recommendation. Port counsel shall evaluate the complaint and issue a determination within thirty (30) days of receiving all relevant evidence, that the complaint is substantiated or unsubstantiated. If Port counsel finds misconduct and the complaint substantiated, a report to Executive Director and the Commission shall set forth the basis for the determination and a recommended action; otherwise, the complaint shall be dismissed.

5.6 Notification. The Complainant and Respondent(s) shall be notified in writing of the determination and recommended action; or, of the dismissal.

5.7 Hearing and Decision upon Recommended Action. The Complainant and Respondent(s) shall have the right to be heard before the Commission or, if pending before a neutral as discussed below, to be heard before the neutral. If the complaint received is against one Commissioner, following receipt of the determination and recommended action from Port counsel, the Commissioners who are not a party to the complaint shall promptly hear, consider and vote upon the recommended action. If the complaint received is made by one or more of the Commissioners against one or more Commissioner, the determination and recommended action of Port counsel shall be submitted to a mutually agreeable neutral selected from the panel of neutrals available at the Seattle office of Judicial Arbitration and Mediation Services (“JAMS”) or Judicial Dispute Resolution (“JDR”), or other similarly qualified third party neutral as agreed upon by the Complainant and the Respondents. The neutral selected shall promptly hear, consider and issue a decision regarding the recommended action. If the parties cannot agree upon the selection of a neutral, the presiding judge for Benton County Superior Court shall select a neutral from the panel available at the Seattle office of JAMS or JDR. The neutral shall determine the hearing process and shall issue a decision within 30 days of the hearing.

5.8 Reconsideration. A decision (whether by Commission vote or issued by a neutral) is subject to reconsideration upon written request by Complainant or Respondent(s). The sole ground for reconsideration shall be that the party seeking reconsideration has new, relevant information which was not considered by Port counsel. A party having new information to submit to the Commissioners or neutral, shall have fifteen (15) days of receipt of the written notice of decision to file a written request for reconsideration stating the reason and including the new information not considered by the Port counsel. Following review of the entire investigative file, the decision and recommendation of the Port counsel and the new information submitted by a party or parties, the Commission or, if applicable, the neutral, shall, within fifteen (15) days of receipt of such new information, hear, consider and render a final decision which may not be further appealed. The parties shall be notified of the final decision, and any action required by the final decision shall be implemented immediately.

5.9 Sanctions. Censure and/or reprimand may be invoked with respect to Commissioner misconduct, in addition to reassignment of committee assignments and other actions.

5.10 Public Notification. Unless otherwise determined by the Commission or neutral in a particular matter, it shall be standard procedure to publish, in a manner deemed appropriate by the Commission or neutral, the fact of any sanction.

5.11 Other Remedies Reserved. Any action taken by the Commission or neutral shall not prevent other legal action that may be available under law. The Port shall not indemnify or defend any Commissioner charged with misconduct, except as otherwise provided under Section 18.

# Memo

**TO:** Port of Kennewick Board of Commissioners and Chief Executive Officer

**FROM:** Lucinda J. Luke, Port Counsel

**DATE:** August 6, 2019

**RE:** Recommended Action

---

## **I. OVERVIEW**

Incorporated herein by reference is the Report of Independent Investigation dated August 6, 2019 conducted by independent legal counsel, Tara L. Parker (the "Report"). As set forth in the Report, Ms. Parker investigated misconduct allegations against Port of Kennewick Commissioner Don Barnes and Commissioner Thomas Moak. The misconduct allegations were received in a complaint submitted on March 25, 2019 (the "Complaint"). The Report sets forth Ms. Parker's determination and the basis for her determination. This memo sets forth the recommended action resulting from the substantiated misconduct.

At pages 17 and 18 of the Report, Ms. Parker sets forth her determination that certain of the allegations of misconduct reported in the Complaint were substantiated, as follows:

1. Commissioner Barnes did violate the Port Rules and Policies when he called DPZ and the SAO regarding business matters.
2. Commissioner Barnes did create a hostile work environment for Port CEO in violation of Port policies.
3. Commissioner Moak violated the Port Rule requiring civil and respectful treatment of others on one occasion.



## **II. SANCTIONS AVAILABLE UNDER PORT COMMISSION RULES**

Section 5.5 of the Commission Rules of Policy and Procedure (see Exhibit 3 of the Report for reference to the revised Section 5 adopted by the Commission on June 11, 2019) states that if Port counsel finds misconduct and the complaint substantiated, a report to Executive Director and the Commission shall set forth the basis for the determination and a recommended action.

The following Port Rules set forth the sanctions that may be levied as the result of a substantiated complaint of misconduct:

Section 5.9 of the Port Rules states:

Censure and/or reprimand may be invoked with respect to Commissioner misconduct, in addition to reassignment of committee assignments and other actions.

Section 5.10 of the Port Rules states:

Unless otherwise determined by the commission or neutral in a particular matter, it shall be standard procedure to publish, in a manner deemed appropriate by the Commission or neutral, the fact of any sanction.

Section 5.11 of the Port Rules states:

Any action taken by the Commission or neutral shall not prevent other legal action that may be available under the law. The Port shall not indemnify or defend any Commissioner charged with misconduct, except as otherwise provided under Section 18.

## **III. RECOMMENDED ACTION**

As referenced above, Ms. Parker has substantiated certain allegations of misconduct by Commissioner Barnes and Commissioner Moak. Pursuant to the Port Rules, the following is the recommended action for each of the substantiated allegations:

### **1. Commissioner Barnes did violate the Port Rules and Policies when he called DPZ and the SAO regarding business matters.**

The recommended actions for this violation by Commissioner Barnes is:

- A. Formal public censure by resolution adopted by the Commission.
- B. Satisfactory completion of training identified by Port Counsel covering topics including
  - roles and responsibilities of a Port Commissioner
  - Port of Kennewick Commission Rules and Policies

Commissioner Barnes shall be personally responsible for any cost or fee associated with the training.

- C. Publication of the above sanctions in the Tri-City Herald.

**2. Commissioner Barnes did create a hostile work environment for Port CEO in violation of Port policies.**

Because of its serious nature and broad impact, there are several recommended actions resulting from this substantiated allegation of misconduct, as follows:

- A. Formal public censure in the form of a resolution adopted by the Commission.
- B. Satisfactory completion by Commissioner Barnes of training identified by Port Counsel covering the following topics:

- understanding, correcting, and preventing hostile work environment behaviors
- professional communication skills
- roles and responsibilities of a Port Commissioner
- Port of Kennewick Commission Rules and Policies

Costs and fees for all such training shall be paid by Commissioner Barnes.

- C. Cooperative participation in team building activities and trainings with Port CEO and staff. Such activities shall be identified by Port Counsel with the assistance of outside consultants, Port CEO and staff.

- D. Publication of the above sanctions in the Tri-City Herald.

**3. Commissioner Moak violated the Port Rule requiring civil and respectful treatment of others on one occasion.**

The recommended action for this violation is:

- A. Verbal reprimand reported in Commission meeting minutes.
- B. Satisfactory completion by Commissioner Moak of training identified by Port Counsel covering the following topics:

- professional communication skills
- Port Commission Rules and Policies

Costs and fees for all such training shall be paid by Commissioner Moak.

C. Cooperative participation in team building activities and trainings with Port CEO and staff. Such activities shall be identified by Port Counsel with the assistance of consultants, Port CEO and staff.

D. Publication of the above sanctions in the Tri-City Herald.

# Memo

TO: Port of Kennewick Board of Commissioners and Chief Executive Officer

FROM: Lucinda J. Luke, Port Counsel

DATE: August 7, 2019

RE: Receipt and Processing of Report and Recommended Action

The investigation of the March 25, 2019 citizen complaint (the "Complaint") has been completed and independent legal counsel issued her findings in her August 6, 2019 Report ("Report"). The recommended actions have been set forth in a memorandum dated August 6, 2019 ("Memorandum"). Pursuant to Port Rules 5.5 and 5.6, the Report and Memorandum have been submitted to the Commissioners (Complainant and Respondents) and to the Chief Executive Officer.

Attached for ease of reference is the revised Section 5 of the Port Commission Rules of Policy and Procedure adopted by the Commission under Resolution 19-10 on June 11, 2019.

The following provides an outline of the next steps in the processing of the Complaint pursuant to Section 5 of the Port Rules:

## 5.7 Hearing and Decision upon Recommended Action

- The Complainant and Respondent(s) shall have the right to be heard before a neutral.
- If a hearing is requested, the determination and recommended action of Port counsel shall be submitted to a mutually agreeable neutral selected from the panel of neutrals available at the Seattle office of Judicial Arbitration and Mediation Services ("JAMS") or Judicial Dispute Resolution ("JDR"), or other similarly qualified third party neutral as agreed upon by the Complainant and the Respondents.

- The neutral selected shall promptly hear, consider and issue a decision regarding the recommended action.
- If the parties cannot agree upon the selection of a neutral, the presiding judge for Benton County Superior Court shall select a neutral from the panel available at the Seattle office of JAMS or JDR.
- The neutral shall determine the hearing process and shall issue a decision within 30 days of the hearing.

#### 5.8 Reconsideration.

- The neutral's decision is subject to reconsideration upon written request by Complainant or Respondent(s).
- The sole ground for reconsideration shall be that the party seeking reconsideration has new, relevant information which was not considered by Port counsel.
- A party having new information to submit to the neutral, shall have fifteen (15) days of receipt of the written notice of decision to file a written request for reconsideration stating the reason and including the new information not considered by the Port counsel.
- Following review of the entire investigative file, the decision and recommendation of the Port counsel and the new information submitted by a party or parties, the neutral, shall, within fifteen (15) days of receipt of such new information, hear, consider and render a final decision which may not be further appealed.
- The parties shall be notified of the final decision, and any action required by the final decision shall be implemented immediately.

#### 5.10 Public Notification.

- Unless otherwise determined by the neutral in a particular matter, it shall be standard procedure to publish, in a manner deemed appropriate by the neutral, the fact of any sanction.

If a hearing is not requested, the recommended action of Port counsel will be implemented by the Commission.

## 5. REPORTING MISCONDUCT

5.1 General. The Port is committed to lawful and ethical behavior in all of its activities and requires its staff and Commissioners to conduct themselves in a manner that complies with all applicable laws, regulations and this policy. Complaints against staff (other than the Executive Director) shall be resolved by the Executive Director, according to law and the Port Policies and Procedures manual. Complaints against the Executive Director shall be resolved by the Port Commission according to applicable contract, Delegation of Authority and the Port Policies and Procedures manual. Complaints against Commissioners shall be resolved as set forth below.

5.2 Complaint. If any person believes that a Commissioner or Commissioners have engaged in misconduct, the Executive Director shall investigate consistent with Section 5.3 and report to the Commission. No employee will be discharged, threatened, or discriminated against in any manner for following up on any complaint or for reporting what they perceive to be misconduct. All complaints must include a description of the alleged misconduct. The proceedings shall be treated confidentially, including the name of the complainant, except to the extent required to complete any investigation and in the event that an action is taken.

5.3 Initial Determination. Based upon the complaint, and only following investigation and with the advice and counsel of Port general or special legal counsel ("Port counsel"), the Executive Director shall determine whether sufficient evidence exists to proceed with an investigation. If the Executive Director determines that insufficient evidence exists, the complaint shall be dismissed. Otherwise, the Executive Director shall proceed as follows.

5.4 Investigation. If an investigation is warranted, the Executive Director shall recuse himself from the process and delegate all further steps to Port counsel, and/or an investigator retained for such purpose by Port counsel. Port counsel shall inform the party/ies subject of the complaint (Respondent(s)) in writing that a complaint has been filed and that an investigation will take place. Port counsel shall provide a copy of the complaint to the Respondent(s) and the Respondent(s) shall have a reasonable time to prepare and submit a response in writing. Port counsel may seek additional information regarding the matter from the Complainant, the Respondent(s) and/or relevant third parties. In conducting the investigation and evaluating all evidence, the Port's counsel shall presume that the Respondent(s) acted ethically and shall determine that an act of professional misconduct has occurred only upon a finding of substantial evidence of such misconduct.

5.5 Determination and Recommendation. Port counsel shall evaluate the complaint and issue a determination within thirty (30) days of receiving all relevant evidence, that the complaint is substantiated or unsubstantiated. If Port counsel finds misconduct and the complaint substantiated, a report to Executive Director and the Commission shall set forth the basis for the determination and a recommended action; otherwise, the complaint shall be dismissed.

5.6 Notification. The Complainant and Respondent(s) shall be notified in writing of the determination and recommended action; or, of the dismissal.

5.7 Hearing and Decision upon Recommended Action. The Complainant and Respondent(s) shall have the right to be heard before the Commission or, if pending before a neutral as discussed below, to be heard before the neutral. If the complaint received is against one Commissioner, following receipt of the determination and recommended action from Port counsel, the Commissioners who are not a party to the complaint shall promptly hear, consider and vote upon the recommended action. If the complaint received is made by one or more of the Commissioners against one or more Commissioner, the determination and recommended action of Port counsel shall be submitted to a mutually agreeable neutral selected from the panel of neutrals available at the Seattle office of Judicial Arbitration and Mediation Services (“JAMS”) or Judicial Dispute Resolution (“JDR”), or other similarly qualified third party neutral as agreed upon by the Complainant and the Respondents. The neutral selected shall promptly hear, consider and issue a decision regarding the recommended action. If the parties cannot agree upon the selection of a neutral, the presiding judge for Benton County Superior Court shall select a neutral from the panel available at the Seattle office of JAMS or JDR. The neutral shall determine the hearing process and shall issue a decision within 30 days of the hearing.

5.8 Reconsideration. A decision (whether by Commission vote or issued by a neutral) is subject to reconsideration upon written request by Complainant or Respondent(s). The sole ground for reconsideration shall be that the party seeking reconsideration has new, relevant information which was not considered by Port counsel. A party having new information to submit to the Commissioners or neutral, shall have fifteen (15) days of receipt of the written notice of decision to file a written request for reconsideration stating the reason and including the new information not considered by the Port counsel. Following review of the entire investigative file, the decision and recommendation of the Port counsel and the new information submitted by a party or parties, the Commission or, if applicable, the neutral, shall, within fifteen (15) days of receipt of such new information, hear, consider and render a final decision which may not be further appealed. The parties shall be notified of the final decision, and any action required by the final decision shall be implemented immediately.

5.9 Sanctions. Censure and/or reprimand may be invoked with respect to Commissioner misconduct, in addition to reassignment of committee assignments and other actions.

5.10 Public Notification. Unless otherwise determined by the Commission or neutral in a particular matter, it shall be standard procedure to publish, in a manner deemed appropriate by the Commission or neutral, the fact of any sanction.

5.11 Other Remedies Reserved. Any action taken by the Commission or neutral shall not prevent other legal action that may be available under law. The Port shall not indemnify or defend any Commissioner charged with misconduct, except as otherwise provided under Section 18.